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Supreme Court, U.S.
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PETITION FOR WRIT OF CERTIORARI

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

FRANCIS L. GILL,

PETITIONER,

- vs -

TERRITORY OF GUAM,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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83 pp

QUESTION PRESENTED FOR REVIEW

Did the Government of Guam exceed its authority by claiming ownership of private real property in Guam which the United States recognized as private property with private ownership rights the United States agreed not to impair by the terms of the Treaty of Peace of 1898 with Spain which resulted in Petitioner's convictions?

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	The Government of Guam exceeded its authority by claiming ownership of private real property in Guam which the United States recognized as private property with private ownership rights the United States agreed not to impair by the terms of the Treaty of Peace of 1898 with Spain which resulted in Petitioner's convictions.	
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The Petitioner Francis L. Gill, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court Of Appeals for the Ninth Circuit ("Appeals Court") entered on July 18, 1995, with request for rehearing denied on the merits on

August 31, 1995.

I. OPINION BELOW

On 18 July 1995, the Appeals Court entered its Opinion affirming Petitioner's convictions for Attempted Theft of Immovable Property of the Government of Guam and Conspiracy to Tamper With Records. A copy of the 18 July 1995 Opinion which is reported at 61 F.3d 688, is attached as Appendix "A". On August 31, 1995 the Appeals Court denied Petitioner's request for rehearing on the merits. A copy of this denial is attached as Appendix "B".

II. JURISDICTION

On July 18, 1995, the Appeals Court entered its Opinion affirming Petitioner's conviction for Attempted Theft Of Immovable Property owned by the Government of Guam and Conspiracy To

Tamper With Records. [App. A]. On August 31, 1995 the Appeals Court denied Petitioner's request for rehearing. [App. B]. Petitioner is a resident of the Territory of Guam and the charges in this case alledge violations of Guam Territorial Statutes. Petitioner filed a timely appeal to the Appellate Division of the District Court of Guam under Title 48, United States Code, Section 1424-3(a) and subsequently filed a timely appeal to the Appeals Court authorized by Title 48, United States Code Section 1424-3(c). Jurisdiction of this Court is invoked under Title 48, United States Code, Section 1424-2 and Title 28, United States Code, Section 1254(1).

III. TABLE OF AUTHORITIES

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1084-5, 55 L.Ed.2d
303 (1978) 12
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Wells v. Lizama, 396
F.2d 877, 883
(9th Cir. 1968) 18

TREATIES

Treaty of Peace between the United States of America and Spain, signed at Paris, December 10, 1898, and proclaimed April 11, 1899, 30 Stat. 1755, attached as Appendix "C" 1
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Article II of the Treaty of Peace of 1898:

> Spain cedes to the United States ... the island of Guam in the Marianas or Ladrones.

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Article VIII of the Treaty of Peace of 1898:

> In conformity with the

provisions of Articles I, II and III of this treaty, Spain relinquishes ... in the island of Guam, ..., all the buildings, wharves, barracks, forts, structures, public highways and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the crown of Spain.

And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of

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whatsoever nationality such individuals may be.

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STATUTORY PROVISIONS

Title 48, United States Code, Section 1421a:

Guam is hereby declared to be an unincorporated territory of the United States ... The Government of Guam shall have the powers set forth in this Act, ...

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Title 48, United States Code, Section1421c(a):

Continuation of Laws in Force; Modification or repeal of laws. (a) The laws of Guam in force on

August 1, 1950, except as amended by this chapter, are hereby continued in force, subject to modification or repeal by the Congress of the United States or the Legislature of Guam, and all laws of Guam inconsistent with the provisions of this chapter are hereby repealed to the extent of such inconsistency.

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Title 48, United States Code, Section 1421f:

Title to Property Transferred. (a) The title to all property, real and personal, owned by the United States and employed by the naval government of Guam in the administration of civil affairs of the inhabitants of Guam, including automotive and other equipment, tools and machinery, water and sewerage facilities, bus lines and other utilities, hospitals, schools, and other buildings, shall be transferred to the

government of Guam within ninety days after the date of enactment of this Act [Organic Act].

(b) All other property, real and personal, owned by the United States in Guam, not reserved by the President of the United States within ninety days after the date of enactment of this Act [Orgaic Act], is hereby placed under the control of the government of Guam, to be administered for the benefit of the people of Guam, and the legislature shall have the authority, subject to such limitations as may be imposed upon its acts by this Act [Organic Act] or subsequent acts of the Congress, to legislate with respect to such property, real and personal, in such manner as it may deem desirable.

(c) All property owned by the United States in Guam, the title to which is not transferred to the government of Guam by subsection (a) hereof, or

which is not placed under the control of the government of Guam by subsection (b) hereof, is transferred to the administrative supervision of the Secretary of the Interior, except as the President may from time to time otherwise prescribe: Provided, That the Secretary of the Interior shall be authorized to lease or to sell, on such terms as he may deem in the public interest, any property, real and personal, of the United States under his administrative supervision in Guam not needed for public purposes.

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Title 21, Guam Code Annotated, Section 1202:

The Government of Guam is the owner ... of all property of which there is no other owner.

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Title 21, Guam Code Annotated, Section 19101:

Occupation Confers Certain Title. Occupancy for any period confers a title sufficient against all except the government of Guam or the United States and those who have title by prescription, accession, transfer, will, or succession: provided, however, that the title conferred by such occupancy shall not be a sufficient interest in real property to enable the occupant or his privies to commence or maintain an action to quiet title under the provisions of Section 738 of the Code of Civil Procedure of Guam, unless such occupancy shall have ripened into title by prescription. 17

Title 21, Guam Code Annotated, Section 19102:

Prescription. Occupancy for the period prescribed

by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription, which is sufficient against all.

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Title 7, Guam Code Annotated, Section 11205:

When Seizin Necessary within 5 years. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action.

Title 21, Guam Code Annotated, Section 29101:

Titles to Real Estate. A system for registering titles to real estate is hereby established. This

enactment may be cited as the Land Title Registration Law. 3
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Title 21, Guam Code Annotated, Section 29106:

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Where applicant has been in possession more than five years. If it appears by the petition that the applicant, either by himself or by himself and his predecessors in interest, has been in the actual, exclusive, and adverse possession of, or any part of, the land described, continuously for more than five (5) years next preceding the filing of the petition claiming to own the same in fee against the world, and that he has or that he and his predecessors in interest have paid all taxes of every kind legally levied or assessed against such property during said period, the petition must then also state the character of such

possession and the applicant must prove the same to the satisfaction of the court on the hearing.

Each application must be accompanied by an abstract of title to all land which does not appear by said petition to have been adversely held as hereinabove provided; except that when the title to the land or any part of the land described has been previously determined by a final decree of a court of competent jurisdiction no abstract regarding the same need antedate such decree. When actual, exclusive, and adverse possession and payment of taxes is alleged but not proved to the satisfaction of the court on the hearing, the court may require an abstract of title to be furnished which shall then be used in the same manner as if it had been filed with the application. All abstracts herein referred to must be

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verified by the searcher making the same.

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Title 21, Guam Code Annotated, Section 29136:

Title Not Acquirable by Adverse Possession. After land has been registered, no title thereto adverse or in derogation to the title of the registered owner shall be required [sic] by any length of possession.
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Title 21, Guam Code Annotated, Section 60601:

Survey of Government Land: Duty of Territorial Surveyor. All real property belonging to the government of Guam for which certificates of title have not been issued, shall be surveyed and mapped in order to accomplish the registration of such

property. The Territorial Surveyor shall carry out a program, on a continuing basis, to so survey and register government-owned land, and such program shall include, but not necessarily be limited to the following:

(a) Completing the calculation and field traverse necessary to establish the Guam Geodetic Triangulation Net, including the referencing of all markers, the integration of such system with those previously established on Guam, and the restoration of all monuments destroyed since the initiation of said system;

(b) Researching all existing survey records and plans, selecting those surveys that can be utilized, updating such survey by connecting them to the Guam Geodetic Traingulation Net, verifying questionable boundaries, and completing

registration proceedings for those lots for which surveys already exist;

(c) Selecting from the remaining parcels of government land those parcels of highest land value and proceeding to survey them in order of value, on a parcel basis, until all government of Guam land is surveyed;

(d) Putting all parcels of government of Guam land on the cadastral maps of the government;

(e) Submitting to the Legislature, prior to any appropriations, a systematic program of planned surveys for the following year, showing the estimated amounts of funds needed for each such separate survey, and the estimated time of completion.

There is hereby authorized to be appropriated the sum of not to exceed Nine Hundred Thousand Dollars

($900,000.00) to carry out the purposes of this Law.

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Title 21, Guam Code Annotated, Section 60602:

Land Survey Revolving Fund. There is hereby established a land Survey Revolving Fund within the cognizance of the Director, Department of Land Management to continue and finish the surveying, mapping, and registration of all government-owned real properties throughout the island. Such revolving fund shall be maintained separate and apart from any other funds of the government of Guam, and independent records and accounts shall be maintained in connection therewith as prescribed by the Director, Department of Administration.

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IV. STATEMENT OF THE CASE

Less than fifty percent (50%) of the land in Guam is surveyed with registered ownership. [Petitioner's Excerpts of Record in the Appeal Court hereinafter "E.R." 10, P. 94].

The Superceding indictment filed October 17, 1990, charged Petitioner with Conspiracy To Commit Theft Of Government of Guam owned land, Attempted Theft Of Government of Guam owned land and Conspiracy To Tamper With Records [E.R.1].

Guam was conquered by the United States of America ("United States") in the Spanish American War and its territory was ceded to the United States in the Treaty of Peace between the United States and Spain signed at Paris, December 10, 1898 and proclaimed April

11, 1899, attached as Appendix "C" ("Treaty of Peace"). 30 Stat. 1755. This treaty divided land ownership in Guam into private and public land. [App. C at Article VIII]. All title to public land in Guam was placed with the United States while the United States recognized private holdings and agreed not to impair then existing private ownership rights to real property. [App. C at Article VIII].

In 1950, the Organic Act of Guam (48 U.S.C. 1421a) established the Government of Guam and conveyed United States owned land used in the administration of civil affairs of the Territory of Guam to the Government of Guam. 48 U.S.C. 1421 f(a). These conveyances to the Government of Guam from the United States were substantially similar to the public lands and property ceded to the United States by Spain in the Treaty of Peace. [App. C

at Article VIII]. All other land owned by the United States in Guam not reserved by the Unites States for its use was placed under the control of the Government of Guam, with title remaining with the United States. 48 U.S.C. 1421 f(b).

In 1953, due to the unreliability of title to Guam real estate, Guam enacted the Land Title Registration Law which established a system for surveying and registering titles to Guam real estate. 21 Guam Code Ann. 29101.

In 1967, to further clarify land ownership rights in Guam, especially between public and private holdings, Guam enacted Title 21, Guam Code Annotated, Sections 60601, 60602 which required the Government of Guam to survey and obtain registered title to its real property. All the land in issue in this case were

unsurveyed by the Government of Guam on October 17, 1990, the date the superceding indictment was filed against Petitioner. The disputed land was still unregistered and untitled when Petitioner was tried. [E.R. pp.81-82; 16 p.126].

On April 3, 1992, Petitioner was tried by a jury which returned guilty verdicts for the charges brought by the Government of Guam concerning the unsurveyed, untitled land, to which the Government of Guam claimed ownership. [E.R.29 (Exhibits)].

The essential nature of the charges against Petitioner was that he had prepared survey maps and obtained Department of Land Management, Government of Guam, approval for their recordation while including within the boundaries of these maps Government of Guam owned land. [See: Trial Transcripts].

The Government of Guam did not establish its ownership interests to the real property by any documentary evidence or expert testimony at trial. [See: Trial Transcripts]. The Government of Guam did not establish any ownership interests in the disputed land through any chain of title originating from public lands ceded to the United States by Spain in the Treaty of Peace or by conveyance from the United States, or through exercise of its Organic Act of Guam powers. [See: Trial Transcripts]. Instead, on appeal, to prove its ownership of the disputed property, the Government of Guam primarily relied on the operation of Title 21, Guam Code Annotated Section 1202. [Brief of Appellant filed in Appeals Court at p.21]. This Section places ownership of all land without an owner in Guam with

the Government of Guam.

After the guilty verdicts, on April 14, 1992, Petitioner's trial counsel filed a Motion for Judgment of Acquittal After Guilty Verdicts on the ground that the Government of Guam failed to prove its ownership of the disputed property. [E.R. 20]. Judge Weeks, the trial judge, denied this motion on May 12, 1992 [E.R. 21]. A copy of Judge Week's Decision and Order dated May 12, 1992 is attached as Appendix "D".

Judge Weeks found that the Government of Guam's interest in the real property was established, even though short of title, and was a sufficient interest to sustain the charges against Petitioner, because any interests held by the Government of Guam in the disputed property was not subject to adverse possession or possession by occupancy.

[App. D].

Besides the implicit recognition of a sovereign ownership interest in the disputed land which presumably places that property interest beyond private ownership rights such as adverse possession or possession by occupancy, Judge Weeks recognized no independent chain of title derived from the United States or acquired through exercise of the Government of Guam's lawful Organic Act of Guam powers supporting or establishing the Government of Guam's acquisition of an interest in the disputed properties. [App. D].

Petitioner timely filed an Appeal to the District Court of Guam, Appellate Division, which entered its Opinion on April 5, 1994. (District Court Docket 17). The District Court, Appellate Division, Opinion at page 21 stated:

> This conclusion [that the disputed property is Government land] is supported by Guam law. The panel takes judicial notice of Title 21 Guam Code Annotated Section 1202, where it is provided that all land not owned by another owner belongs to the Government of Guam...

Petitioner timely filed an Appeal on April 22, 1994 to the Appeals Court from that Opinion. (District Court Docket 19).

On July 18, 1995 the Appeals Court upheld Petitioners convictions stating that the Government of Guam proved its ownership of the disputed land partly because:

> [B]y statute, all property of which there is no other owner is owned by the Guam Government.

> 21 Guam Code Ann. Sec. 1202. Thus by definition, Gill's [Petitioner's] efforts to assert control over land that he did not own, and was not owned by another, was an attempt to gain title to government [of Guam] land.

[App A at P. 8861; Guam v. Francis L. Gill, 61 F.3d 688, 693 (9th Cir. 1995)].

REASONS FOR GRANTING THE WRIT

The Government of Guam exceeded its authority by claiming ownership of private real property in Guam, which the United States recognized as private property, with private ownership rights the United States agreed not to impair by the terms of the Treaty of Peace of 1898 with Spain which resulted in Petitioner's convictions.

Guam was ceded to the United States by Spain pursuant to Article II of the Treaty Of Peace. [App.C]. The Treaty of Peace at Article VIII divided land ownership between public and private holdings and the United States recognized existing private holdings and rights and agreed not to impair private land ownership rights of all kinds in Guam. [App. C]. It follows then that, on execution of the Treaty of Peace, all land in Guam was owned or claimed by private individuals or was public land ceded to the United States by Spain. [App. C. at Articles II and VIII].

Except for a brief period between December 1941 to July 1944 when Japan invaded and occupied Guam, the United States retained ownership of all publicly owned land in Guam until the creation of the Government of Guam in 1950, when land

used in the administration of civil affairs of the Territory of Guam was transferred to the newly created Government of Guam. 48 U.S.C. 1421 f(a). The land transferred to the newly created Government of Guam by operation of Section 1421f(a) substantially mirrored that transferred to the United States by Spain in the Treaty of Peace at Article VIII. [App. C]. In the Organic Act of Guam, the Government of Guam was not empowered to claim ownership of privately claimed land or private interests in land recognized as such by the United States under the terms of the Treaty of Peace. 48 U.S.C. 1421a.

The Government of Guam has only those powers specifically conferred upon it by congress in 48 U.S.C. 1421(a) and is in essence an instrumentality of the Federal Government of the United States.

United States v. Wheeler, 435 U.S. 313, 320-21, 98 S.Ct. 1079, 1084-85, 55 L.Ed.2d 303; Binns v. United States, 194 U.S. 486, 491, 24 S.CT. 816, 817, 48 L.Ed. 1807; DeLima v. Bidwell, 182 U.S. 1, 196-197, 21 S.Ct. 743, 752, 45 L.Ed. 1401, Mormon Church v. United States, 136 U.S. 1, 42, 10 S.Ct. 792, 802, 34 L.Ed. 481; Murphy v. Ramsey, 114 U.S. 15, 44-45, 5 S.Ct. 747, 763, 29 L.Ed. 47. Since the Government of Guam has no inherent sovereign status beyond that conveyed to it by the United States, it cannot, despite Guam law to the contrary, establish sovereign ownership interests in land except by way of powers which the United States has specifically provided it. Id.

Nevertheless, the Government of Guam claims ownership over the disputed land under a broad sweeping Guam statute:

> Government Property. The government of Guam is the owner of all land below tidewater, and below ordinary high-water mark, bordering on tidewater within Guam; of all land below the water of a navigable lake or stream; of all property lawfully appropriated by it to its own use; of all property dedicated to the government; and of all property of which there is no other owner. (Emphasis added).

21 Guam Code Ann. Sec. 1202.

Although the Government of Guam claims ownership of significant real property interests under Title 21, Guam Code Annotated, Section 1202, this exercise of its sovereignty or power is invalid to the extent that it exceeds its

United States Government grant in the Organic Act of Guam as amended. Wheeler, supra. The Government of Guam, because it has no inherent or original sovereign powers, in fact, has ownership of only those lands specifically conveyed to it by the United States or acquired by it pursuant to an exercise of its powers as defined by Congress in the Organic Act of Guam as amended. 48 U.S.C. 1421a, Wheeler, supra.

The Government of Guam cannot claim ownership of private land which contradicts the terms of a treaty between the United States and another sovereign, since a United States treaty is equivalent to a United States law. Bidwell, supra, 21 S.Ct. 752. The exercise of governmental powers by the Government of Guam is subject to applicable United States laws and

treaties, and therefore, laws enacted by the Government of Guam which violates a United States treaty obligation are invalid. 48 U.S.C. 1421c(a).

During Petitioner's trial, the Government of Guam did not establish title to the disputed land as derived from a United States conveyance or chain of title or that the disputed property was used in the administration of civil affairs of the inhabitants of Guam prior to 1950, nor did it establish that it acquired the disputed property or any interest therein by way of its defined powers in the Organic Act of Guam as amended. [See: Trial Transcripts.] Congress has never granted the Government of Guam the power to claim ownership of private Guam land without a titled owner of record which has never been defined and accepted as public land by the United

States under the terms of the Treaty of Peace. [App. C]. Land ownership interests not specifically defined as public lands owned by the United States by virtue of the Treaty of Peace was implicitly recognized by the United States as privately owned or claimed land subject to the guarantees of the Treaty. [App. C].

The United States in Article VIII of the Treaty of Peace agreed that the cession of Guam from Spain "cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds ... of private individuals ...." [App. C]. Thus, by definition, all land not claimed or recognized by the United States as public lands ceded to it pursuant to the Treaty of Peace was implicitly recognized by the United States to be private

property with private rights of ownership and use within the private sector, and which rights are subject to its protection. [App. C]. These protected private ownership rights must logically include the United States's consent that private claims to real property be subject to the normal laws governing private ownership and use of real property in Guam. These rights include the right to establish and register title of claims of ownership under the Land Title Registration Law, the right to adverse possession and the right to possession by occupancy or prescription. 21 Guam Code Ann. Secs. 19101, 19102, 29101, 29106.

Guam was invaded and occupied by Japan in December of 1941. Ngiraingas v. Sanchez, 495 U.S. 182, 110 S.CT. 1739, 1740, 109 L.Ed.2d. 163. It was liberated

by the United States in July of 1944. Id. This resulted in obvious dislocation of traditional land occupancy patterns and destruction of traditional boundary markers which created additional confusion and unreliability surrounding the ownership of Guam real estate.

In 1953, approximately six (6) years after the liberation of Guam, because of the uncertainty surrounding ownership of land in Guam, the Guam legislature enacted the Land Title Registration Law. 21 Guam Code Ann. Sec. 29101. The purpose of the Land Title Registration Law was "to allow confident reliance upon record title under the Act." Wells v. Lizama, 396 F.2d 877, 883 (9th Cir. 1968). The Land Title Registration Law contemplated registration of claims without a chain of title and based solely on adverse possession and payment of

taxes levied on the relevant property for a period of five (5) years for all claims to all real property interests in Guam not owned by the United States. 21 Guam Code Ann. Sec. 29106.

It follows then that, land recognized as being in the private sector by the United States, by virtue of the Treaty of Peace, must be subject to registration of titles through claims of adverse possession pursuant to the Land Title Registration Law. None of the alleged conduct of Petitioner is inconsistent with an exercise of this right.

To clearly define the Government of Guam's ownership interests in Guam real estate, however acquired, the Guam legislature in 1967, required that Guam's interests in land be surveyed and their titles registered. 21 Guam Code Ann.

Sec. 60601, 60602. Section 60601 states in relevant part:

> All real property belonging to the Government of Guam for which certificates of title have not been issued, shall be surveyed and mapped in order to accomplish the registration of such property.

21 Guam Code Ann. Sec. 60601.

This effort was consistent with and bolstered the goals of the Land Title Registration Law by requiring the Government of Guam to clearly define the boundaries of land believed to be Government of Guam owned land, from the boundaries of real property interests subject to private claims by obtaining registered title to its claims of ownership. The Government of Guam would

thereby also establish the boundaries of its land not subject to the adverse possession rights of Title 21, Guam Code Annotated, Section 29106, since all land with title issued pursuant to the Land Title Registration Law cannot be adversely possessed. 21 Guam Code Ann. Sec. 29136.

When the Government of Guam indicted Petitioner for attempting to steal its land, it had not surveyed the disputed property. [E.R. pp.18-82; 16, p.126]. At Petitioner's trial, it was established that the disputed land was still unregistered and therefore untitled under the Land Title Registration Law. [Id.]. Instead of complying with Guam law by clearly defining its claims of ownership by surveying and registering them, the Government of Guam relies on Section 1202 and its prosecutorial powers to define a

broad interest in unsurveyed, untitled land, essentially defeating the purpose of the comprehensive statutory scheme of the Land Title Registration Law by perpetuating a continued lack of confidence in land ownership rights in Guam with all its undesirable adverse consequences for all Guam residents.

Thus, the Government of Guam's claim of an ownership interest in real property that has never been owned, designated or claimed by the United States as public land, or which ownership interests the Government of Guam did not acquire pursuant to its defined powers in the Organic Act of Guam as amended, is an impairment of private land ownership rights, in Guam, which was recognized and protected by the United States in the Treaty of Peace, and which, the Government of Guam has no inherent or

independent sovereign authority to abrogate.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully Submitted this 28th day of November, 1995.

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APPENDIX "A"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE PEOPLE OF THE TERRITORY OF GUAM, *Plaintiff-Appellee,* v. FRANCIS L. GILL, *Defendant-Appellant.*	No. 94-10230 D.C. No. CR-92-00099A OPINION

Appeal from the United States District Court
for the District of Guam, Appellate Division
Rafeedie, Munson, and Unpingco, Judges, Presiding

Argued and Submitted
June 13, 1995—San Francisco, California

Filed July 18, 1995

Before: Procter Hug, Jr., Arthur L. Alarcon
and Stephen S. Trott, Circuit Judges.

Opinion by Judge Trott

SUMMARY

Criminal Law and Procedure/Litigation and Procedure

The court of appeals affirmed a district court judgment of conviction, but remanded to correct a clerical error. The court held the availability of a statutory land registration proceeding to resolve disputes as to the ownership of purported government property does not bar the government from prosecuting

a person for attempting to illegitimately obtain interests in the property through the recordation of counterfeit survey maps.

Francis Gill, an attorney, was charged with five counts, including attempted theft of immovable property, conspiracy to commit theft, and conspiracy to tamper with records. The counts stemmed from his participation in the creation and recordation of counterfeit maps for four parcels of property on Guam. At trial, the government presented evidence that Gill, with the cooperation of a surveyor and a Department of Land Management employee, sought to gain title to land he did not own, by obtaining Land Management approval of counterfeit survey maps that were deliberately drawn to encompass government land.

The jury returned guilty verdicts on all counts. However, the district court entered judgments of conviction on only four counts. The court determined that it could not enter judgment on the conspiracy count, because a Guam statute prevented a final conviction for conspiracy when the defendant was separately convicted of the criminal objectives of the conspiracy.

Gill appealed the convictions to the Appellate Division of the District Court for the District of Guam, which affirmed. Gill appealed, contending, among other things, that Guam's statutory scheme for land registration precluded his prosecution for attempted theft of government land.

[1] Under Guam's land registration scheme, Gill could not effect a transfer of the disputed property without adjudicating the ownership issue in a land registration proceeding. [2] However, commentary to the Model Penal Code indicated that the availability to the government of this civil remedy did not bar criminal prosecution for theft, when the person sought to benefit himself through the illegitimate transfer of interests in real property. [3] In addition, because Guam does not recognize factual impossibility as a defense to an attempt charge, whether Gill's use of the counterfeit maps would ultimately

succeed in depriving the government of its land was irrelevant to Gill's criminal culpability.

[4] Criminal culpability under a Guam statute that criminalizes behavior when the actor unlawfully transfers immovable property of another or an interest therein with the intent to deprive the other person of the property or interest, was not necessarily dependent on a demonstration that the defendant attempted to deprive another of fee simple title. [5] The existence of a civil proceeding for establishing absolute ownership of property in land registration disputes did not bar the government from proving, as part of its criminal case, that Gill sought to obtain the ownership interest of another by unlawful means because, although the civil land registration statute and the criminal unlawful transfer statute both addressed the same subject matter, they had different purposes.

[6] The facts alleged in the indictment and the evidence presented by the government at trial demonstrated that, in addition to causing the counterfeit maps to be filed, Gill engaged the surveyor to produce the maps, was aware of the surveyor's "contacts" with the Land Management employee, and intended to use the maps to establish ownership to the land. [7] These facts and evidence could support a jury's finding that Gill took a substantial step towards committing the crime of theft of immovable property, a necessary element in the attempt charge.

[8] Because Guam's law provided that all land for which there was no owner was owned by the government, Gill's efforts to assert control over land that he did not own, and that was not owned by another, was an attempt to gain title to government land. [9] In addition, the evidence in the record was sufficient to allow a trier of fact to infer Gill's intent to engage in an illegal conspiracy to tamper with records. The evidence included the surveyor's testimony that he and Gill enlarged the survey maps knowing that they encompassed

government land, that the surveyor told Gill that the title to some of the lots was "no good," that Gill paid the surveyor four times his normal fee to create the counterfeit maps, that Gill was aware of the surveyor's contacts at Land Management, and that Gill was surprised when the contacts resulted in Land Management approval.

[10] A comment to the Guam Code indicated that the purpose of the Guam statute that criminalizes falsification of any writing or record with intent to deceive or injure anyone, is to punish a defendant who falsifies a writing or record, or falsifies a writing or record that is recordable. Thus, Gill's conduct in conspiring with the surveyor to falsify survey maps for recordation, fit within that statute's proscription.

[11] Remand was necessary to correct the trial court's clerical error in entering a judgment of conviction to the conspiracy to falsify records charge pursuant to a different, but related, statute.

[12] Issues not properly first raised on appeal to the Appellate Division of the Guam District Court were not to be considered.

COUNSEL

Barry K. Tagawa, San Francisco, California, for the defendant-appellant.

J. Andrew Artero-Boname, Assistant Attorney General, Agana, Guam, for the plaintiff-appellee.

OPINION

TROTT, Circuit Judge:

OVERVIEW

Francis L. Gill appeals the District Court of Guam, Appellate Division's affirmance of his jury conviction in Guam Superior Court for conspiracy to commit theft of immovable property, attempted theft, and conspiracy to tamper with records.

We have jurisdiction over this timely appeal pursuant to 48 U.S.C. § 1424-3(c). We affirm the jury conviction on all three charges, but remand for correction of a clerical mistake.

BACKGROUND

1. *Guam's Land Registration System*

This case involves an alleged attempt by Gill, an attorney, to obtain title to government land through the manipulation of Guam's land registration system. Guam's Land Title Registration Act, codified at 21 Guam Code Ann. §§ 29101-29206, is based on the Torrens system of land registration. Under this system, a claimant of a particular piece of property may submit a draft survey map of the claimed land to the Guam Department of Land Management ("Land Management") for preliminary approval. After the map is returned, and any corrections suggested by Land Management are made, a final map, signed by both the claimant and surveyor, may be filed with Land Management for approval and recordation.

Once the map has been accepted, a claimant may petition the superior court for a decree of title. *See id.* § 29105. The claimant's petition must be supported by a survey map and some evidence of ownership. *Id.* §§ 29105, 29106. If, after public notice, there is no objection to the petition, the "land

court" generally will enter a decree in favor of the claimant and issue a certificate of title. *Id.* §§ 29115, 29123. One year from the date the land registration proceeding concludes, the title to the property in the registered owner becomes uncontestable, unless it can be shown the title was obtained by fraud. *Id.* § 29146. Of course, if the property is conveyed to a bona fide purchaser, allegations of fraud cannot deprive the new owner of title. *Id.* § 29139.

2. *Facts and Prior Proceedings*

Gill was charged with three counts of attempted theft of immovable property, 9 Guam Code Ann. §§ 13.10, 43.30(b), one count of conspiracy to commit theft, 9 Guam Code Ann. §§ 13.30, 43.30(b), and one count of conspiracy to tamper with records, Guam Code Ann. §§ 13.30, 46.25. These charges stem from Gill's participation in the creation and recordation of maps for four parcels of property on Guam.

At trial, the government presented evidence indicating that Gill, with the cooperation of surveyor Thomas T. Anderson and Land Management employee Joseph B. Cruz, sought to gain title to land he did not own, by obtaining Land Management approval of survey maps that were deliberately drawn to encompass government land. Apparently, Anderson was able to secure Land Management approval of the bogus maps because of his "good contacts" within the agency. In some instances, Anderson, with the help of Cruz, was able to procure phony tax assessment records for the "new" land.

The government's evidence included the testimony of Anderson and the introduction of the counterfeit maps. For example, Anderson testified that Gill asked him to survey the lots Gill had purchased so as to include land outside the parcels' boundaries, that Gill paid Anderson four times the going rate for his services, that Gill was aware of Anderson's "good contacts" at Land Management, that Gill was surprised when Anderson's contacts resulted in the approval of the fabricated

maps, and that Gill intended to use the maps as evidence of ownership.

The jury also was able to compare maps of the various parcels. The maps demonstrated the size of a parcel when purchased by Gill and the size of the same parcel after it had been enlarged for Land Management approval. The maps fabricated for the purpose of Land Management approval were signed by Gill.

Finally, the government elicited testimony from Frank Castro, Director of Land Management, and Jimmy Camacho, a Land Management employee, that the land encompassed by the counterfeit maps was government land.

The jury returned guilty verdicts on all three charges. The superior court entered a judgment of conviction on the attempted theft charge, but did not enter judgment on the conspiracy to commit theft charge. The superior court determined that 9 Guam Code Ann. § 1.22 "prevent[ed] a final conviction for conspiracy where the criminal objectives of that conspiracy are separately convicted upon." On the last charge, conspiracy to tamper with records, the superior court entered a judgment of conviction pursuant to 9 Guam Code Ann. § 55.10, even though Gill was tried, and the jury was instructed, on a charge arising under 9 Guam Code Ann. § 46.25.

Gill appealed the convictions to the Appellate Division of the District Court of Guam. In an unanimous decision, the court affirmed. Gill timely appeals, claiming a multitude of errors.

DISCUSSION

I

Gill first contends that the existence of Guam's land registration system precludes the government's use of 9 Guam

Code Ann. § 43.30(b) to prosecute Gill for attempted theft of government land. Section 43.30(b) criminalizes behavior where the actor "unlawfully transfers immovable property of another or any interest therein with intent to deprive him thereof." Thus, the government was required to prove that Gill (1) took a substantial step toward (2) causing an unlawful transfer of immovable property (3) of another (4) with the intent to deprive the owner of his interest. Relying on the statutory scheme created by Guam's land registration system, Gill advances three reasons why his actions were not properly the subject of a criminal prosecution.

a. *A Civil Remedy*

[1] Gill correctly notes that he could not effect a transfer of the disputed property without adjudicating the ownership issue in a "land court." He contends that any injury claimed by the government was subject to correction during a land registration proceeding and therefore his conduct could not amount to an attempted theft of real estate.

[2] In making this argument, Gill implies that the existence of a potential civil remedy bars the government's use of the criminal statute. However, commentary to Model Penal Code ("MPC") § 223.2, the provision upon which 9 Guam Code Ann. § 43.30(b) was modeled, indicates that the availability of a civil proceeding does not make criminal prosecution for theft inappropriate "in cases where a person seeks to benefit himself . . . through the illegitimate transfer of interests in real property." MPC § 223.2 cmt. 5, at 173. "There is little to distinguish such cases from any other attempt to secure economic benefit at the expense of another." *Id.*

[3] Gill also assumes that the government must demonstrate as an essential element of its case that the defendant's activity was certain to achieve the prohibited result. No such requirement exists. Indeed, Guam does not recognize factual impossibility as a defense to an attempt charge. 9 Guam Code Ann.

§ 13.15. Whether Gill's use of the counterfeit maps would ultimately succeed in depriving the government of its land is irrelevant to Gill's criminal culpability.

b. *Determination of Ownership*

[4] Gill argues that he cannot be prosecuted for the theft of another's property because the government has not established via a land registration proceeding that Guam in fact owns the contested real estate. However, section 43.30(b) requires only that the criminal defendant unlawfully transfer "immovable property of another or *any interest therein.*" (Emphasis added.). Thus, criminal culpability under the statute is not necessarily dependent on a demonstration that the defendant attempted to deprive another of fee simple title.

[5] Similarly, the existence of a civil forum for establishing absolute ownership does not bar the government from proving, as part of its criminal case, that Gill sought to obtain the ownership interest of another by unlawful means. The purpose of the proscription encompassed by section 43.30(b) is to punish a person who seeks to benefit himself "through the illegitimate transfer of interests in real property." MPC § 223.2 cmt. 5, at 173. The purpose of the land registration proceeding is to adjudicate the legal title to real estate. When a civil statute and a criminal statute both address the same subject matter, but have different purposes, they are not mutually exclusive. *Cf. United States v. McCool*, 751 F.2d 1112, 1113 (9th 1985) (civil statute that provides exclusive remedy to owners who claim their copyrighted work is infringed does not preclude criminal prosecution for willful copyright infringement).

c. *Privilege to Infringe*

Gill claims that under the Land Title Registration Act he was statutorily privileged to infringe on the government's property. According to Gill, Guam's statutory scheme permits

any person who claims a ownership interest in a particular property to file a land registration proceeding for the purpose of determining the ownership rights to the land in question. *See* 21 Guam Code Ann. § 29105. Gill argues he should not be prosecuted for conduct the land registration system allows. This argument lacks merit. The cited section does not provide a safe harbor to an individual engaged in a scheme to obtain ownership of real estate through the use of bogus maps. *See* 21 Guam Code Ann. § 29138 (fraudulently obtained title is voidable).

II

Gill next contends that the government failed to meet its various burdens at trial. In reviewing these claims, we must determine whether "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Campbell*, 42 F.3d 1199, 1203 (9th Cir. 1994) (internal quotation omitted), *cert. denied*, 115 S. Ct. 1814 (1995). To the extent Gill attacks the sufficiency of the indictment, we review this question de novo. *United States v. Dischner*, 974 F.2d 1502, 1518 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1290 (1993).

a. *Attempt*

[6] Gill claims that he "did not take any substantial step towards the transfer of another's interest in immovable property," and that as a matter of law, "recorded maps do not constitute an attempt to unlawfully transfer" real estate. The allegations contained in the indictment and the evidence presented at trial, however, show that Gill did more than merely file maps: he engaged Anderson to produce survey maps that included land he had no right to claim, he caused the bogus maps to be filed, he was aware of Anderson's "good contacts" within Land Management, and he intended to use the maps as evidence of ownership.

[7] A person is guilty of an "attempt to commit a crime when, with intent to engage in conduct which would constitute such crime . . . he performs . . . an act which constitutes a substantial step toward commission of the crime." 9 Guam Code Ann. § 13.10. The facts alleged in the indictment and the evidence introduced by the government at trial could support a jury finding that Gill took a substantial step towards committing the crime of theft of immovable property. *Cf. id.* cmt. (substantial step includes the "fabrication of materials to be employed in the commission of a crime, . . . where such . . . fabrication serves no lawful purpose of the defendant under the circumstances").

b. *Sufficiency of the Evidence*

Gill maintains that the government did not prove the property encompassed by the survey maps was in fact government land. We disagree.

First, section 43.30(b) requires only that the land subject to the theft be property of another. At trial the government presented ample evidence showing that Gill directed Anderson to draw the maps to include land to which Gill had no claim of right. This evidence included the testimony of Anderson and the introduction of the enlarged maps, signed by Gill.

[8] Moreover, by statute, "all property of which there is no other owner" is owned by the Guam government. 21 Guam Code Ann. § 1202. Thus, by definition, Gill's efforts to assert control over land that he did not own, and that was not owned "by another," was an attempt to gain title to government land.

Second, contrary to Gill's assertion, the trial testimony of Frank Castro, Director of Land Management, demonstrated that some of the property included within the forged maps' boundaries was land the Guam government had surveyed and specifically claimed.

Lastly, two Land Management employees testified that the land in question was the property of the Guam government. Gill now attacks this testimony as improper, but he failed to raise an objection at trial. Failure to make a timely objection constitutes a waiver of that objection. *United States v. Rivera*, 43 F.3d 1291, 1295 (9th Cir. 1995). The superior court's admission of the testimony was not plain error, *see id.*; *United States v. Pena-Espinoza*, 47 F.3d 356, 360 (9th Cir. 1995), and the testimony was sufficient to establish the government's interest in the real estate.

c. *Criminal Intent to Conspire*

[9] Gill also argues the government failed to offer evidence establishing Gill's intent to engage in an illegal conspiracy to tamper with records.[1] Under 9 Guam Code Ann. § 46.25 the government was required to prove 1) a conspiracy 2) to falsify 3) any writing or record 4) with intent to deceive. The trial record is replete with evidence sufficient to allow a trier of fact to infer Gill's criminal culpability. *See United States v. Foster*, No. 89-10405, slip op. at 6586 (9th Cir. June 8, 1995) (circumstantial evidence and inferences drawn therefrom are sufficient to sustain a conspiracy conviction). The testimony of Anderson indicated that Gill and Anderson enlarged the survey maps knowing the maps encompassed government

[1]Gill challenges the government's case regarding both conspiracy charges. However, a judgment of conviction was not entered on the conspiracy to commit theft charge and Gill was not sentenced on account of that crime. Under Guam law, the government may prosecute the defendant on multiple charges stemming from the same conduct, but the defendant may not be convicted of more than one offense if one of the charged offenses consists only of a conspiracy to commit the other. 9 Guam Code Ann. § 1.22(b). Because Gill was prosecuted, and a guilty verdict was returned, on both an attempted theft charge and a conspiracy to commit theft charge, the trial court did not enter judgment on the conspiracy charge. Thus, Gill's complaints concerning the theft conspiracy are not ripe for review. *Cf. United States v. Ripinsky*, 20 F.3d 359, 361-62 (9th Cir. 1994) (return of a guilty verdict does not constitute a conviction until a judgment of conviction is entered).

land Gill, that Anderson told Gill the title to some of the lots was "no good," that Gill paid Anderson four times his normal fee to create the bogus survey maps, that Gill caused the falsified maps to be filed, that Gill was aware of Anderson's "good contacts" at Land Management, and that Gill was surprised when Anderson's contacts resulted in Land Management approval. Furthermore, at trial, the government introduced the counterfeit maps, surveyed by Anderson and signed by Gill, which demonstrated the enlargement of Gill's lots to include government land.

Viewed in the light most favorable to the prosecution, the evidence supported Gill's conviction on the conspiracy to tamper with records charge. *Cf. United States v. Homick*, 964 F.2d 899, 906 (9th Cir. 1992) (three conversations indicating the defendant was aware of the other conspirators' fraudulent claim to ownership was sufficient evidence to allow a jury to find the defendant was a willing participant in the conspiracy).

III

a. *Application of 9 Guam Code Ann. § 46.25*

Finally, Gill attacks his prosecution pursuant to 9 Guam Code Ann. § 46.25. He claims section 46.25 prohibits falsification of *private* records, and does not reach falsification of *public* records. Apparently, Gill is contending he should have been charged under 9 Guam Code Ann. § 55.10, which makes it a crime for any person to tamper with *public* records.[2]

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[2]A defendant violates 9 Guam Code Ann. § 46.25 if

> knowing that he has no privilege to do so, he falsifies, destroys, removes, or conceals any writing or record, with intent to deceive or injure anyone or to conceal any wrongdoing.

A violation of 9 Guam Code Ann. § 55.10 occurs when the defendant

> (1) knowingly makes a false entry in, or false alteration of, any record, document or thing belonging to, or received or kept

Section 46.25 and its companion section 46.20 are part of a chapter addressing forgery and fraudulent practices. On the other hand, section 55.10 is part of a chapter concerned with a defendant's interference with government operations and law enforcement. *See* 9 Guam Code Ann. ch. 55 cmt. Thus, the proscriptions embraced by chapter 46 are designed to punish fraudulent activity perpetrated against individuals, while chapter 55 prohibits conduct harmful to governmental operations.

[10] The comment to section 46.20 indicates that the purpose of section 46.25, like the purpose of section 46.20, is to punish a defendant who falsifies a writing or record, or falsifies a writing or record that is recordable. *See* 9 Guam Code Ann. § 46.20 cmt. ("Section 46.25 completely overlaps § 46.20 and thus provides a lesser included offense."). Here, Gill was accused of conspiring with Anderson to falsify survey maps for recordation, for the purpose of depriving the government of its real estate. Thus, Gill's conduct fits within the proscription encompassed by section 46.25. Perhaps Gill could have been charged under section 55.10, which prohibits the knowing presentation of a false document for recordation, but contrary to Gill's contention, section 55.10 does not address Gill's prohibited conduct with more specificity.

[11] The confusion regarding the applicability of section 46.25 and section 55.10 apparently infected the post-trial phase of Gill's proceedings. Although a guilty verdict was returned on the section 46.25 charge, the superior court inad-

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by the government for information or record, or required by law to be kept by others for information of the government;

(2) makes, presents or uses any record, document or thing knowing it to be false, and with intent that it be taken as a genuine part of information or records referred to in Paragraph (1); or

(3) intentionally an unlawfully destroys, conceals, removes or otherwise impairs the verity or availability of any such record, document or thing.

vertently entered a judgment of conviction pursuant to section 55.10. At oral argument the government candidly acknowledged responsibility for this clerical error and asked that we remand for its correction. Gill's counsel did not object, and accordingly we grant the government's request. *See* Fed. R. Crim. P. 36.

IV

a. *Waiver of the Remaining Issues*

Gill concedes that the remaining issues he invites us to review were not raised in his appeal to the Appellate Division. Nevertheless, he maintains that Ninth Circuit case law allows us to hear these additional arguments because they address questions of law, and the pertinent factual record was fully developed below. The cases Gill cite for support, however, concern our willingness to consider issues not raised in the *trial court* but presented for appellate review. *See, e.g., Cristobal v. Siegel*, 26 F.3d 1488, 1493 (9th Cir. 1994). In contrast, issues not presented to an appellate court in the opening brief are deemed waived, unless enforcement of the "waiver rule" would result in a manifest injustice. *See, e.g., United States v. Loya*, 807 F.2d 1483, 1486-87 (9th Cir. 1987).

[12] Because "this court has long recognized that, when sitting as the Appellate Division, the District Court of Guam 'functions as a local territorial appellate court,' " *Aguon v. Calvo*, 951 F.2d 1131, 1132 (9th Cir. 1991), we have applied the waiver rule to issues not properly raised on appeal to the Appellate Division, *Guam v. Reyes*, 879 F.2d 646, 648-49 (9th Cir. 1989). Our refusal to hear arguments not presented to the Appellate Division, comports with the characterization of our relationship to Guam's courts as being similar to our relations with the state courts. *Guam v. Yang*, 850 F.2d 507, 510 (9th Cir. 1988) (en banc). The Supreme Court has stated that "[i]n the exercise of our appellate jurisdiction to review

the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 435 (1940).

In light of this authority, and because there is no likelihood of a manifest injustice, we do not consider Gill's remaining arguments, raised for the first time on appeal to this court.[3]

CONCLUSION

The decision of the Appellate Division is AFFIRMED, and the case is REMANDED for the limited purpose of correcting the clerical mistake that occurred during the entry of judgment.

[3]One of the many issues Gill raises concerns the Guam Superior Court's failure to instruct the jury on the necessity of its finding that the property subject to the attempted theft had a value in excess of $1,500. At oral argument, however, Gill's counsel candidly conceded there was no question the land was worth more than the statutorily required minimum.

A P P E N D I X "B"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PEOPLE OF THE
TERRITORY OF GUAM

Plaintiff-Appellee,

v.

FRANCIS L. GILL

Defendant-Appellant.

Ninth Circuit Docket No. 94-10230
District Court No. CR92-00099A

ORDER

Before: HUG, ALARCON and TROTT,
Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX "C"

BY THE PRESIDENT OF THE
UNITED STATES OF AMERICA

A PROCLAMATION.

Whereas, a Treaty of Peace between the United States of America and Her Majesty the Queen Regent of Spain, in the name of her August Son, Don alfonso XIII, was concluded and signed by their respective plenipotentiaries at Paris on the tenth day of December, 1898, the original of which Convention being in the English and Spanish languages, is word for word as follows:

THE UNITED STATES OF AMERICA AND HER MAJESTY THE QUEEN REGENT OF SPAIN, IN THE NAME OF HER AUGUST SON DON ALFONSO XIII, desiring to end the state of war now existing between the two counties, have for that purpose appointed as Plenipotentiaries:

THE PRESIDENT OF THE UNITED STATES,

WILLIAM R. DAY, CUSHMAN K. DAVIS, WILLIAM P. FRYE, GEORGE GRAY, and WHITELAW REID, citizens of the United States;

AND HER MAJESTY THE QUEEN REGENT OF SPAIN,

DON EUGENIO MONTERO RIOS, President of the Senate,

DON BUENAVENTURA DE ABARZUZA, Senator of the Kingdom and ex-Minister of the Crown,

DON JOSE DE GARNICA, Deputy to the Cortes and Associate Justice of the Supreme Court;

DON WENCESLAO RAMIREZ DE VILLA-URRUTIA, Envoy Extraordinary and Minister Plenipotentiary at Brussels, and

DON RAFAEL CERERO, General of Division;

Who, having assembled in Paris, and having exchanged their full powers, which

were found to be in due and proper form, have, after discussion of the matters before them, agreed upon the following articles:

ARTICLE I.

Spain relinquishes all claim of sovereignty over and title to Cuba.

And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

ARTICE II.

Spain cedes to the United States the island of Puerto Rico and other islands now under Spanish sovereignty in the West

Indies, and the island of Guam in the Marianas or Ladrones.

ARTICLE III.

Spain cedes to the United States the archipelago known as the Philippines Islands, and comprehending the islands lying within the following line:

A line running from the west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi, from the one hundred and eighteenth (118th) to the one hundred and twenty seventh (127th) degree meridian of longitude cast of Greenwich, thence along the one hundred and twenty seventh (127th) degree meridian of longitude east of Greenwich to the parallel of four degrees and forty five minutes ($4^{o}45'$) north latitude,

thence along the parallel of four degrees and forty five minutes ($4^{o}45'$) north latitude to its intersection with the meridian of longitude one hundred and nineteen degrees and thirty five minutes ($119^{o}35'$) east of Greenwich, thence along the meridian of longitude one hundred and nineteen degrees and thirty five minutes ($119^{o}35'$) east of Greenwich to the parallel of latitude seven degrees and forty minutes ($7^{o}40'$) north thence along the parallel of latitude seven degrees and forty minutes ($7^{o}40'$) north to its intersection with the one hundred and sixteenth (116th) degree meridian of longitude east of Greenwich, thence by direct line to the intersection of the tenth (10th) degree parallel of north latitude with the one hundred and eighteenth (118th) degree meridian of

longitude east of Greenwich, and thence along the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich to the point of beginning.

The United States will pay to Spain the sum of twenty million dollars ($20,000,000) within three months after the exchange of the ratifications of the present treaty.

ARTICLE IV.

The United States will, for the term of ten years from the date of the exchange of the ratifications of the present treaty, admit Spanish ships and merchandise to the ports of the Philippines Islands on the same terms as ships and merchandise of the United States.

ARTICLE V.

The United States will, upon the signature of the present treaty, send

back to Spain, at its own cost, the Spanish solders [sic] taken as prisoners of war on the capture of Manila by the American forces. The arms of the soldiers in question shall be restored to them.

Spain will, upon the exchange of the ratifications of the present treaty, proceed to evacuate the Philippines, as well as the island of Guam, on terms similar to those agreed upon by the Commissioners appointed to arrange for the evacuation of Puerto Rico and other islands in the West

Indies, under the Protocol of August 12, 1898, which is to continue in force till its provisions are completely executed.

The time within which the evacuation

of the Philippines Islands and Guam shall be completed shall be fixed by the two Governments. Stands of colors, uncaptured war vessels, small arms, guns of all calibres, with their carriages and accessories, powder, ammunition, live stock, and materials and supplies of all kinds, belonging to the land and naval forces of Spain in the Philippines and Guam, remain the property of Spain. Pieces of heavy ordinance, exclusive of field artillery, in the fortifications and coast defenses, shall remain in their emplacements for the term of six months, to be reckoned from the exchange of ratifications of the treaty; and the United States may, in the mean time, purchase such material from Spain, if a satisfactory agreement between the two Governmetns of the subject shall be reached.

ARTICLE V. [sic]

Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offences, in connection with the insurrections in Cuba and the Philippines and the war with the United States.

Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

The Government of the United States will at its own cost return to Spain and the Government of Spain will at its own cost return to the United States, Cuba, Puerto Rico, and the Philippines, according to the situation of their

respective homes, prisoners released or caused to be released by them, respectively, under this article.

ARTICLE VII.

The United States and Spain mutually relinquish all claims for indemnity, national and individuals, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

In conformity with the provisions of Articles I, II, and III of this treaty, Spain relinquishes in Cuba, and cedes in Puerto Rico and other islands in the West Indies, in the island of Guam, and in the Philippines Archipelago, all the buildings, wharves, barracks, forts, structures, public highways and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain.

And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any

other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be.

The aforesaid relinquishment or cession, as the case may be, includes all documents exclusively referring to the sovereignty relinquished or ceded that may exist in the archives of the Peninsula. Where any document insuch archives only in part relates to said sovereignty, a copy of such part will be furnished whenever it shall be requested. Like rules shall be reciprocally observed in favor of Spain in respect of documents in the archives of the islands above referred to.

In the aforesaid relinquishment or cession, as the case may be, are also

included such rights as the Crown of Spain and its authorities possess in respect of the official archives and records, executive as well as judicial, in the islands above referred to, which relate to said islands or the rights and property of theri inhabitants. Such archives and records shall be carefully preserved, and private persons shall without distinction have the right to require, in accordance with law, authenticated copies of the contracts wills and other instruments forming part of notarial protocols of files, or which may be contained in the executive or judicial archives, be the latter in Spain or in the islands aforesaid.

ARTICLE IX.

Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty

relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such alws as are applicable to other foreigners. In case they remain

in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which

declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

ARTICLE X.

The inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion.

ARTICLE XI.

The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject in matters civil as well as criminal to the jurisdiction of the courts of the country

wherein they reside, pursuant to the ordinary laws governing the same; and they shall have the right to appear before such courts, and to pursue the same course as citizens of the country to which the courts belong.

ARTICLE XII.

Judicial proceedings pending at the time of the exchange or ratifications of this treaty in the territories over which Spain relinquishes or cedes her sovereignty shall be determined according to the following rules:

1. Judgments rendered either in civil suits between private individuals, or in criminal matters, before the date mentioned, and with respect to which there is no recourse or right of review under the Spanish law, shall be deemed to be final, and shall be executed in due

form by competent authority in the territory within which such judgments should be carried out.

2. Civil suits between private individuals which may on the date mentioned be undetermined shall be prosecuted to judgment before the court in which they may then be pending or in the court that may be substituted therefor.

3. Criminal actions pending on the date mentioned before the Supreme Court of Spain against citizens of the territory which by this treaty ceases to be Spanish shall continue under its jurisdiction until final judgment; but, such judgment having been rendered, the execution thereof shall be committed to the competent authority of the place in which the case arose.

ARTICLE XIII.

The rights of property secured by copyrights and patents acquired by Spaniards in the Island of Cuba, and in Puerto Rico, the Philippines and other ceded territories, at the time of the exchange of the ratifications of this treaty, shall continue to be respected. Spanish scientific, literary and artistic works, not subversive of public order in the territories in question, shall continue to be admitted free of duty into such territories, for the period of ten years; to be reckoned from the date of the exchange of the ratificaitons of this treaty.

ARTICLE XIV.

Spain shall have the power to establish consular officers in the ports

and places of the territories, the sovereignty over which has been either relinquished or ceded by the present treaty.

ARTICLE XV.

The Government of each country will, for the term of ten years, accord to the merchant vessels of the other country the same treatment in respect of all port charges, including entrance and clearance dues, light dues, and tonnage duties, as it accords to its own merchang vessels, not engaged in the coastwise trade.

This article may at any time be terminated on six months' notice given by either Government to the other.

ARTICLE XVI.

It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy

thereof; but it will upon the termination of such occupancy, advise any Government established in the island to assume the same obligations.

ARTICLE XVII.

The present treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by Her Majesty the Queen Regent of Spain; and the ratifications shall be exchanged at Washington within six months from the date hereof, or earlier if possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this treaty and have hereunto affixed our seals.

Done in duplicate at Paris, the tenth day of December, in the year of Our

Lord one thousand eight hundred and ninety eight.

[SEAL] WILLIAM R. DAY

[SEAL] CUSHMAN K. DAVIS

[SEAL] WM. P. FRYE

[SEAL] GEO. GRAY

[SEAL] WHITELAW REID.

And whereas, the said Convention has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Washington, on the eleventh day of April, one thousand eight hundred and ninety-nine;

Now, therefore, be it known that I, William McKinley, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof may be observed and

fulfilled with good faith by the United Stats and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this eleventh day of April, in the year of Our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

[SEAL] WILLIAM McKINLEY

By the Presidnet:

JOHN HAY

Secretary of State.

APPENDIX "D"

IN THE SUPERIOR COURT OF GUAM

TERRITORY OF GUAM

THE PEOPLE OF THE
TERRITORY OF GUAM

v.

JOSEPH B. CRUZ AND
FRANCIS L. GILL

Defendants.

CRIMINAL CASE NO. CF0119-90

DECISION AND ORDER

On 3 April 1992 the jury returned a verdict of guilty on all charges. Defendant Cruz, represented by James Maher, moved for acquittal on the fourth and eighth charges. Defendant Gill, represented by Attorney Howard Trapp, moved for acquittal on the second, third and seventh charges, and Defendant Cruz joined in Defendant Gill's motion. The People, represented by Assistant Attorney General Kim D. Ramey, opposed the motion. The Court reserved judgment.

On a motion for acquittal, the Court must, in viewing the evidence in the light more favorable to the government, determine whether there is sufficient evidence from which a jury could rationally conclude beyond a reasonable doubt that the defendant is guilty of the count charged. United States v. Oldenburg, 762 F.Supp. 272 (N.D. Cal. 1991).

> If the Court does not so find as to each element of the offense charged, a judgment of acquittal must be entered. Id. at 272.

As to charges two (2), attempted theft, and three (3), conspiracy to commit theft, Defendant contends that the

Government has not put forth sufficient evidence to prove a major element in its case, namely that the Government owned

the land involved in the crimes charged. The Government maintains that it proved that the land was Government land. In response, Defendant asserts that title to land can only be proved upon production of a Certificate of Title.

The theft statute provides:

> (b) A person is guilty of theft if he unlawfully transfers immovable property of another or any interest therein with intent to deprive him thereof. 9 G.C.A. Section 43.30(b).

Clearly, the Government must have proved that the land is property of another. 9 G.C.A. section 43.10(e) defines property of another to include "property in which any person other than the defendant has an interest which the defendant is not privileged to infringe." The definition is almost identical to

that in Model Penal code provision 223.0(7).

The Supreme Court of New Jersey in interpreting their own theft statute which is based on the Model Penal Code noted that the essential element is that the property taken is "the property of someone other than the thief." State v. Combariate, 186 N.J. Super. 375, 452 A.2d 710, 711 (1982), aff'd 469 A.2d 40 [emphasis in original].

Since Guam's theft statute is based on the theft provision in the Model Penal Code, this Court will look to the comments to the Model Penal Code for guidance in its determination of whether the Government has proved the major elements. When uniform and model laws are adopted by a state or states, a court can properly consider the official comments as well as

the purblished comments of the drafters of the model code. Griffin v. S.W. Devanney & Co., Inc., 775 P.2d 555 (1989).

The drafters of the Model Penal Code, referring to the definition of property of another, noted, "Obviously, this concept includes any ownership or possessory interest of another." Comments, at pg. 168 [emphasis added].

State courts interpreting their state's theft statutes which are based on the Model Penal Code provision have echoed the sentiment. When uniform and model laws are adopted by a state or states, courts can refer to decisions of the adopting states and can construe statutes in accordance with the constructino they have been given. Neddle v. Lasco Industries, Inc., 10 Cal.App.3d 1105, 89 Cal.Rptr. 593 (1970).

A Pensylvania defendant entered into a contract with a manufacturer without the knowledge or authority of his employer, obtained coupons from a source other than his employer and mailed them in his employer's name, intercepted reimbursement checks, endorsed checks, and deposited them in a personal account. Commonwealth v. Rozenweig, 514 Pa. 111, 522 A.2d 1088 (1987).

The Supreme Court of Pennsylvania found that defendant's employer Esquire had a property interest or "right" in the checks issued in its name "by virtue of the fact that it was the named payee on each of these forty-eight negotiable instruments that came into the possession or custody of its employee." Id. at 1092.

The court reiterated the rule that it is not essential, in theft cases of the kind, that the person named as owner

have

absolute title to the property involved. Id.

Therefore the Government need not have had absolute title to the land, as long as it had an interest in it. That the Government may have some title, although not absolute, to the land in question, despite its lack of Certificate of Title, is clear. This can be demonstrated through an examination of Guam's adverse possession statutes.

The adverse possession statutes, as they relate to the same subject matter, must be construed together. Singer, 2A Sutherland Stat. Const. Section 51.01 (5th Ed. 1992). One statute provides that one cannot gain title through adverse possession to land which has already been registered. 21 G.C.A.

Section 29136. However, Government claims present a special case. Under another provisin "occupancy for any period confers a title sufficient against all except the government of Guam." G.C.C. Section 1006. If the Government had to have registered its title in the land in order to have some interest in it, there would be no need for the Civil Code provisin Section 1006.

Further it is also clear that the law contemplates varying degrees of interest in property.

> ... title conferred by ... occupancy shall not be a sufficient interest in real proprty to enable that occupant or his provides to commence or maintain an action to quiet title ... unless such occupancy shall have ripened into title by prescription. G.C.C. Section

The Government need not have had a Certificate of Title in order to have an interest in the land. The evidence put forward by the People was sufficient for the jury to conclude that the Government did have a property right in the land.

This interest need not be one of absolute title to sustain a conviction under the theft statute.

Regarding the fourth charge, Defendant Cruz claims that there was no evidence presented to prve Cruz knew that the updates of the tax records that he commissioned were false. As to the seventh charge, Defendants claim that Francis Gill was nevery privy to the fact that T. Anderson created false documents. Finally, as to the eighth charge, Defendant Cruz claims that there was no

evidence presented showing that Cruz's alleged request for two new lot numbers constituted an unauthorized exercise of his official function.

On a motion for acquittal the court is not to substitute its judgment of waht the verdict should be for that of the jury. United States v. Dreitzler, 577 F.2d 539, 545 (9th Cir.), cert den 99 S.Ct. 1246, 440 U.S. 921, 59 L.Ed.2d 473 (1978). The Court finds that the Government presented sufficient evidence on the fourth, seventh, and eighth charges such that the jury could rationally conclude beyond a reasonable doubt that defendant is guilty of that charged.

Accordingly, Defendants' motions for acquittal on the second, third, fourth, seventh and eight charges are denied.

SO ORDERED this 5th day of May, 1992.

JANET HEALY WEEKS Judge
Superior Court of Guam

(2)

Supreme Court, U.S.
FILED
MAR 28 1996
CLERK

No. 95-1375

In The
Supreme Court of the United States
October Term, 1995

Francis L. Gill,

Petitioner,

vs.

Territory of Guam,

Respondent

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED

The Respondent wishes to point out that the premise in the Question Presented by the Petitioner has no basis in the Record of this Case. There is no evidence in the Record that the land in question into which Petitioner attempted to expand his property was ever owned by any private interest. Appendix A at p. *8. Further, the Appellate Division determined that the Record showed that the Petitioner knew that the land into which he was expanding his land was government land. Appendix A at p. *8, ¶5.

OPINION BELOW

The July 18, 1995 Decision of the United States Court of Appeals for the Ninth Circuit, entitled *People of the Territory of Guam v. Francis L. Gill*, is reported at 61 F.3d 688.

While mentioned in the above opinion, the Respondents wish to point out that the Ninth Circuit Opinion was not directly reviewing the Judgment of Conviction of the trial court. Rather, the Ninth Circuit was reviewing the Opinion of Guam's intermediate appellate court, the Appellate Division of the District Court of Guam. That Opinion, *People of the Territory of Guam v. Francis L. Gill*, D.Guam Appellate Div., Cr. No. 92-00099A, April 15, 1994, is reported at 1994 WL 150934 (D.Guam). That Opinion is reproduced in this Brief at Appendix A.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is misleading in material parts. The Petitioner never presented the issue of the Treaty of Paris to the Trial Court. Therefore, this question was not addressed by that, or any later, court, and should not be a part of the "Case".

Petitioner further misstates the record where he states that the land in question was both unregistered *and untitled*. Nowhere does Guam law equate *registration* with *ownership*. 21 GCA § 29105.

Further, it is not correct to state that there was *no* evidence of title in the Government of Guam. See Appendix A at p, *8.

Judge Weeks, in answering the Petitioner's Motion to Acquit, did not hold that the Government had an interest "short of title", as stated by Petitioner. Rather, Judge Weeks, in explaining that Registration was not necessary to title stated, on p. 3 of Petitioner's Appendix "D":

> The Government of Guam need not have had a Certificate of Title in order to have an interest in the land. The evidence put forward by the People was sufficient for the jury to conclude that the Government did have a property right in the land. This interest *need not* be one of absolute title to sustain a conviction under the theft statutes. (Emphasis added)

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Territory of Guam ("Respondent") hereby responds to the Petition for Writ of Certiorari ("Petitioner"), filed by Petitioner Francis L. Gill. Respondent respectfully requests that this Court deny the Petition.

Review by this Court is unnecessary because (a) the Question Presented to this Court has not been presented, nor ruled upon, below, (b) the Petitioner fails to identify any of the reasons stated in the rules of this Court, why this case merits certiorari, (c) the Petitioner relies upon erroneous facts, and (d) even if the Petitioner's legal analysis were correct, it would not act to relieve him of criminal liability for his acts.

ARGUMENT

1. The Question Presented was never presented below.

The claim that the Treaty of Peace bars the Territory of Guam from exercising jurisdiction over the land in question was never raised below. This failure is reflected in the decisions of the Appellate Division of the District Court of Guam and the Ninth Circuit Court of Appeals, both of which have now been provided to the Court. See Appendix A, p. *1.

This Court has consistently indicated that it will decline to consider issues, in its review of state cases, where that issue was not "pressed or passed upon in the courts below". *Kentucky v. Stincer*, 482 U.S. 730, 747, n.22, 107 S.Ct. 2658, 2668, n.22, 96 L.Ed.2d 631, (1987) (quoting *McGoldrick v. Compagnie Generale Tranatlantique*, 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed.2d

849 (1940). The *Stincer* decision indicates that even in federal cases the High Court will not review an issue that was not pressed below absent "exceptional circumstances". Id. at n.22. This failure in itself should lead the Court to reject the Petition.

2. Petitioner failed to provide any recognized reasons for the granting of his Petition.

The issue identified is narrow, if not unique. Petitioner urges this Court to consider whether the Treaty of Paris of 1898 (also known as the Treaty of Peace) prevents the Territory of Guam from exercising jurisdiction over Petitioner's attempted theft of real property. This issue does not rise from a claim that he was not guilty of attempting to steal property, only that Guam should be deemed lacking authority to enforce its criminal law as to the parcels in question.

Not surprisingly, the Petitioner has failed to identify a split in Circuit authority over this issue, which is stated as arising from Treaty provisions bearing on Guam. He has not claimed that the decision determines an important federal question in a manner at odds with the decision of a state supreme court, or vice versa, for that matter. Nor does he argue that the decision below represents a departure form the "accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." This would be a difficult point to claim because, as is discussed below, the issue he frames was not raised below in the course of the appeal and was, therefore, not considered by the Ninth Circuit Court of Appeals. Nowhere below was the 1898 Treaty with Spain ever addressed.

3. **The Petitioner relies on an erroneous statement of the facts to support his Petition.**

a. Erroneous statement of the Record

Evidence was presented at trial that the property in issue was transferred from the United States government to the Territory of Guam. What is missing form the record is any evidence to the contrary. The Petitioner adduced no evidence at trial that this property belonged to any private person or other entity than the Territory of Guam. Of this, the Appellate Division of the District Court of Guam stated:

> Appellant's argument fails for the primary reason that the government indeed presented evidence that the land in question was government land. The government elicited testimony from Frank Castro, Director of Land Management, that the land in question was government land. (Tr. III pp. 18-20). The Director of Land Management based his conclusion on the fact that the land in question in this case was transferred to the government of Guam by the United States. (Tr. III pp. 16-17) The government also presented testimony of Department of Land Management worker Jimmy Camacho that the land being claimed was government land. (Tr. IV p. 114). While the evidence that it was government land was not supported by the document creating title in the government of Guam, there was nonetheless adequate and compelling evidence that it certainly did not belong to appellant and that the land was government land. And, this evidence was never contradicted. Appendix A, p. *8.

There is nothing in the records showing any effect upon the properties in question by the Japanese occupation during World War II.

b. **This Petition presents erroneous statements about the state of Guam land law.**

Petitioner incorrectly states that the Land Registration Act was first enacted in 1953 "due to the unreliability of land titles on Guam." A comprehensive history of United States efforts to assure that private lands were protected (and taxed) is contained in the District Court of Guam, Appellate Division decision of *In re application of Anderson Iglesias, et al.*, 1 Guam Reports 129 (1963). Of the current Land Registration Law, that court stated, at p. 139:

> It should be further noted that the Guam Land Title Registration Act, lacking one of the essentials of a true Torrens system as noted above, is effect provides merely a system of quieting title which is essentially an equity matter and in which equitable matters must be considered.

Likewise, Petitioner is in error when he equates registration with title. The present Act provides, in part:

> **21 GCA §29105. Land Brought Under the Law by Filing Petition: Contents, etc.** All land may be brought under the operation of this Law by the owner or owners of any estate or interest therein, whether legal or equitable (other than an individual share or an easement) by filing with the clerk . . .

This section is permissive, allowing owners of land to register or not to register their land as they see fit. Nothing in this law

(Chapter 29) states that non-registration equates to non-title. It has long been held that government land cannot be acquired by a private interest by adverse possession. *Tenorio v. Government of Guam*, 527 F.2d 1095 (9th Cir. 1974); *In Re Application of Yamashita*, 59 F.3d 114 (9th Cir. 1995).

4. The Petitioner's legal analysis is without foundation.

An essential component of the Petitioner's challenge appears to focus on the statute which makes land in the Territory of Guam, having no other owner, the property of Guam. 21 GCA §1202. He appears to urge that the application of this provision usurps the interests of private property owners in a manner which is contrary to the Treaty of Paris. He apparently has not read the statute he harps upon. It is as clear as it is short. It applies when there is no known private owner. For the entire length of the United States occupation of Guam, no private person has been permitted to claim land for which there is no previous owner. See, *generally*, *In Re Application of Anderson Iglesias*, above.

It is fairly obvious that lands having a private owner are not included in its embrace. By its own terms the statute avoids encroaching on private property interests. The issue that the Petitioner seeks to raise is illusory.

5. Even if Petitioner's argument over the civil status had merit, it is irrelevant to his conviction.

As the Ninth Circuit noted in its decision, the offense of attempted theft of property merely requires proof beyond a reasonable doubt that the property being taken is the "property of another". Petitioner's argument that the land does not legitimately belong to the Territory of Guam does not change the fact that it did not belong to him.

This point aside, his argument would still be moot as to its effect on his conviction. It is well settled that a thief can steal from a thief. See, e.g., §390 of Wharton's Criminal Law (1980) (text accompanying note 81 and case authority cited in that note). Even had Guam unlawfully taken this property, this circumstance would not excuse Gill's criminality.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

Dated: March 27, 1996.

Respectfully submitted,

Charles H. Troutman III
Compiler of Laws
Territory of Guam

Attorney for Respondents

APPENDIX "A"

Copr. (C) West 1996 No claim to orig. U.S. govt. works
1994 WL 150934 (D.Guam)
(Cite as: 1994 WL 150934 (D.Guam))

PEOPLE OF the TERRITORY OF GUAM,
Plaintiff-Appellee,
v.
Francis L. GILL,
Defendant-Appellant.
Cr. No. 92-00099A.

District Court of Guam, Appellate Division.
Argued and Submitted Oct. 8, 1993.
Re-Submitted Dec. 14, 1993.
Decided April 15, 1994.

Appeal from the Superior Court of Guam, Superior Court Case No. CF-119-90; Janet Healy Weeks, Presiding.

Elizabeth Barrett-Anderson, Atty. Gen. of Guam by Andrew Artero-Boname, Asst. Atty. Gen., Prosecution Div., Agana, Guam, for plaintiff-appellee.

Howard Trapp, Howard Trapp Inc., Agana, Guam, for defendant-appellant.

Before: EDWARD RAFEEDIE [FN1], ALEX R. MUNSON [FN2] and JOHN S. UNPINGCO, District Judges.

OPINION

UNPINGCO, Judge:

*1 This is an appeal from Appellant's March 27, 1992 conviction for one count of Conspiracy to Commit Theft of Immovable Property, three counts of Attempted Theft of Immovable Property, and one count of Conspiracy to Tamper with Records. Appellant urges reversal on the basis of insufficiency of the evidence, and several other grounds.

First, Appellant argues that there was insufficient evidence adduced at trial to sustain his five convictions for Conspiracy to Commit Theft of Immovable Property, Attempted Theft of Immovable Property and Conspiracy to Tamper with Records. Second, Appellant argues that the evidence was insufficient to establish that the disputed land belonged to the Guam government. Third, Appellant raises a series of grounds for overturning the theft convictions, namely: (1) that Appellant never had a fiduciary relationship with the property, (2) that an attempt to commit an act which is not a crime cannot be the basis of a criminal conviction, and (3) that Appellant was not empowered to dispose of the land. Finally, Appellant argues that the tampering conviction cannot stand because the maps were not public records when created.

PROCEEDINGS BELOW

The defendant was indicted with co-defendants Thomas Anderson ("Anderson") and Joseph B. Cruz ("Cruz") by the territorial grand jury on September 12, 1990, which eventually led to a superseding indictment on September 4, 1991. Defendant Frances Gill ("Gill") was charged with Conspiracy to Commit Theft, Attempted Theft and Conspiracy to Tamper with Public Records. Co-defendant Cruz was indicted for those same crimes, as well as Tampering with Public Records and Official Misconduct. Defendant Anderson pled guilty and testified against defendants Gill and Cruz, who were tried together. Both defendants were found guilty of all counts on March 27, 1992.

FACTS

The convictions resulted from Appellant's participation in the creation and recordation of maps for four parcels of property on Guam. It was proved at trial that defendants re-drew maps of four parcels to encompass government land adjacent to Appellant's parcels. Appellant's lot located in Piti, consisting of 1.6 hectares on one map, [FN3] (or possibly three hectares according to another source), grew to 3.9 hectares on a later map. Appellant's Umatac lot grew from 3 hectares on one map to 10 hectares on a later map, and Agua & Gumoje (Merizo), once 32 and 33 hectares respectively on earlier maps, became

over 300 hectares on the new maps. The transactions went sequentially as follows:

Piti

Frances Gill, a practicing attorney on Guam, was interested in purchasing a parcel of property in Piti from an elderly person, Ms. Emilia Pangelinan. A purchase was arranged, and in December 1988 Ms. Pangelinan executed a Grant Deed to Guam Landvest, Ltd., Gill's corporation. (Exhibit 15). The Grant Deed's property description stated that "Lot No. 215 and place name of Atantano, Piti" was being conveyed. There was no indication of the size of the land being conveyed.

*2 Gill requested Anderson, a registered land surveyor on Guam, to come to his office to talk about surveying the lot in anticipation of a land registration proceeding. At their first meeting, Anderson showed Gill documents that his co-worker had discovered at Land Management which indicated that Lot 215 was 1.6 hectares, but Anderson also told Gill that according to the 1941 tax rolls, the place of "Atantano" showed to be 3 hectares. (Tr. VII p. 112). [FN4]

Anderson also showed Gill a map prepared by a Robert Beam, who did not testify at trial. The map was not introduced into evidence. (Tr. VII p. 112). He told Gill that according to that map, a large parcel of unsurveyed government land stood between Gill's Lot 215 and Marine Drive. Gill asked Anderson, "Can I claim it?" to which Anderson replied "I don't know." Gill then offered Anderson $20,000.00, four times his normal fee, and instructed Anderson to prepare the map claiming the unsurveyed government land. (Tr. VII p. 115-116).

Anderson instructed one of his workers to prepare the map to create a new lot, encompassing Atantano, and including the unnumbered unsurveyed government land. Anderson then received new Lot Number 285 for the lot upon verbal request to Land Management. (Tr. VII p. 119).

Gill instructed Anderson to consolidate Lot 215 and Lot 285 into new Lot 285, comprised of 3.9 hectares and to subdivide it. When the map was ready, Anderson went to Gill's office for signature on the "checkprint." [FN5] (Tr. VII p. 122). The checkprint was sent to Land Management and sent back with comments. None of the comments on

the checkprint noted any irregularity with respect to the unsurveyed government land encompassed by the map. Anderson's office made the necessary corrections and re-submitted the map, which was then approved. (Tr. VII p. 126). There is no direct testimony as to how the approval was obtained, though Jimmy Camacho, a draftsman in the Survey Division of Land Management, testified that he notified Roy Aguilar, the draftsman who prepared the map for Anderson, that it encroached on government land. (Tr. IV p. 114). Aguilar, in turn, testified that he reported this comment to Anderson, but that Mr. Anderson had instructed him to keep the map the way it was. (Tr. IV pp. 137-149).

Anderson went to Gill's office to show him the approved map. Gill is reported to have said "no shit--maps approved?" and then laughed. (Tr. VII p. 126). He then told Anderson that he had some other survey work for him to do.

Umatac

After the Piti project was completed, Anderson told Gill that some land was available near Cetti Bay, Umatac, but Anderson warned Gill that the title to the land was "no good." By "no good" he was referring to the fact that he and Mr. Jose Taimanglo Garcia had, in an elaborate plot, created the title to this lot themselves.

Testimony of Anderson and Garcia revealed a scheme whereby they created new title to unsurveyed government land. Garcia found the names of recently deceased people and forged their names to fictitious deeds to create lots. In actuality, the lots contained unsurveyed government land. Then Anderson went to his cousin, Joe Cruz, who worked at Land Management as the territory's Land Administrator [FN6], and asked for (1) a lot number for the lot, and (2) an "escaped assessment" [FN7] tax record for the lot from the Department of Revenue and Taxation.

*3 Joe Cruz in turn asked the Department of Revenue and Taxation for an escaped assessment on the lots. Testimony established that Vicente Cruz of the Real Property Tax branch of Revenue and Taxation, (no relation to Joe Cruz), was asked for the escaped assessment on the new lots. Vicente Cruz was uncertain as to the basis of the request, so he went to his supervisor, Ray Blas, to ask if he should comply with the request. (Tr. VI p. 78).

Ray Blas testified that because the request came from the Land Administrator of the Territory of Guam, there was no reason not to comply with the request. (Tr. VI p. 94-95). The tax records were created for the lots and Anderson then paid the taxes on the lot, and that created the chain of title.

At the same time as creating a tax record for the land, Cruz also obtained lot numbers for the land. He was given Lot Number 154A for the Umatac lot and Lot Numbers 521 and 522 for the Merizo lots. (Tr. VIII p 76-78). Anderson and Garcia intended to first register the land, and then sell it.

The registration was important, because testimony was that the Japanese developers who were investing in Guam land at that time were not comfortable buying land that was not registered under Guam's Land Registration Act, s 1157 et seq. of the Civil Code. [FN8] (Tr. VII p. 31). To obtain a decree of ownership at a land registration proceeding, one needed only to produce a map, supported by some evidence of title. If no one appeared to object, the decree issued by the Superior Court was deemed conclusive evidence of title.

When Anderson told Gill that title to the Umatac lot was "no good," Gill is reported to have responded "It's okay. I'm a lawyer." (Tr. VII p. 133). Gill was interested in buying the lot from Anderson and went to view the property at Cetti Bay. After he walked the property, he instructed Anderson to map the lot, but to include in the map of Lot 154A all the land "all the way to the existing paved road that leads down to the beach area." (Tr. VIII p. 20).

The maps for Lot 154A Umatac show the development of this transaction: Exhibit 3A shows Lot 154A containing approximately 3 hectares. That map shows the adjacent land as "government of Guam land, unsurveyed." The subsequent map for Lot 154A, shown in Exhibit 3B and drawn by Anderson at Gill's request just four months later, shows an area of 10.4 hectares. When Anderson presented these maps, a checkprint was not presented to Land Management. Nonetheless, the maps were approved.

Though normally a map cannot be approved without the approval of the Territorial Surveyor, there was testimony that during the months in which these events unfolded, the Director of Land Management had delegated to Joseph Cruz the authority to act as the

Director of Land Management. (Tr. III p. 76). Anderson testified that, for instance, the map for Lot 154A Umatac was approved without a checkprint because he had told a friend at Land Management, Bernie Ortega, that "Roy [Aguilar] would be giving him a map that he could sign for me."

*4 Jimmy Camacho, an employee of the Survey Division, also testified about documents that would normally have to clear his office which in fact did not cross his desk but nonetheless bore the initials "JC" on them. Camacho reviewed the "JC" that appeared on Exhibits 3B, (the lot showing 154A to be 10.4 hectares for the first time), 4A, 5A, 6A, 7A, 8, (all maps wherein Gill's Lot 154A was subdivided), 9A, 10A, (both maps of Lot 521 Merizo) and 2C (the checkprint for Lot 285 Piti). He testified that the "JC" appearing on all those exhibits was not his (Jimmy Camacho's) initials, but were of another "JC" at Land Management. (Tr. IV p. 118-123). There were two other "JC" 's who worked at Land Management at that time, James Cruz in Planning Division, (which never is involved in the map approval process), and Joe Cruz, who, as Land Administrator is involved in the map approval process. (Tr. IV p. 122).

Testimony indicated that whenever a lot number is requested, both the requesting surveyor and the Land Management employee assigning the lot number must appear on the lot-number log. (Tr. IV p. 17). When Lot Numbers 521 and 522, Merizo, were assigned, there is no record of who asked for or who gave the lot numbers. (Tr. IV p. 17). Anderson testified that he obtained the new lot numbers for Umatac and Merizo by meeting in person with Joe Cruz, who picked up the phone, asked for new lot numbers, and then gave them to Anderson. (Tr. VIII p. 78-80). There was also testimony that Joe Cruz' sister, an employee of the Land Registry Division, gave Thomas Anderson the lot numbers on Anderson's verbal request. (Tr. VI p. 111).

Having secured a map to the Umatac lots, Gill and Anderson then proceeded to their most ambitious project, the Merizo land.

Merizo

Gill became acquainted with a former lawyer by the name of Yokozeki who represented Japanese corporate interests. Yokozeki testified that some Japanese clients were looking for land on Guam suitable for a golf course, and that Yokozeki and Gill were trying to

find land for them. (Tr. VII p. 33) The suitability depended on the terrain and the proximity of water. (Tr. VII p. 33).

Meanwhile, Gill had asked Anderson if there was any other property "on this kind of a situation," that is, where title to the land was "no good." (Tr. IX p. 9). Anderson told Gill of Lots 521 & 522 Merizo, and Gill knew the lots were "no good." (Tr. VIII p. 82).

Anderson showed Gill a topographical map of Merizo Lots 521 & 522. Exhibits 63A, 63B and 63C. Anderson reported the conversation that occurred while viewing these maps as follows:

Anderson: This is the sketch (Exhibit 63A) that I took over to Francis Gill's office. I present it to him that he would like to increase the area that he wants to claim from what's showing on the tax roll area to be 32 and 33 hectares. He asked me to draw a line that would increase this size around here for his proposed boundary of place name [sic] Agua and Gumoje. After we sit down and discuss this, he said, "I need this area because I have about five clients who are interested in golf course area." *5 Gill then marked the area of government land on Exhibit 63A in yellow which he wished Anderson to include in a survey map.

Mr. Anderson: Yes, we started--I told him that the area your [sic] trying to claim is just beyond anybody's control. (Indicating). The portion here showing contains an area of 91 hectares. The other portion here containing an area of 41 hectares, and the other portion right here contains an area of 164 hectares.

Mr. Ramey: And what did he say?

Mr. Anderson: He asked me to do a survey work and I said, "I can't do this no ways; impossible to claim that much."

Mr. Ramey: Why? Why would it be impossible?

Mr. Anderson: The--based on the tax roll area from thirty two to--it increases so much.

* * *

Mr. Ramey: Okay. And what did he say?

Mr, Anderson: And he said, "Okay then let's come back and what about if we take the best land out of it."

Mr. Ramey: Take the what land?

Mr. Anderson: The best portion out of it, which in the topography map, the closer the line together it would show a .. like a cliff or a very steep hill. The lines that ... further apart shows the area

on ground that would be a nice slope or level area. (Tr. VIII p. 84-85). When Anderson refused to perform this survey for $75,000.00, Gill offered him $150,000.00 and Anderson agreed. (Tr. VIII p. 86).

Anderson mapped the property as directed by Gill and submitted the map to Land Management without prior checkprint approval. Lot 521 was subdivided into Lot 503-NEW and 521-1. The map for this lot was approved in September 1989. It showed an area of 192.05 hectares, or 1.8 million square meters. Exhibit 11A. The prior map of the exact same lot showed an area of 33 hectares. Exhibit 10A.

On that evidence, the jury returned verdicts of guilty on each count.

ARGUMENT ON APPEAL

Defendant Gill argued in the initial briefing that there was insufficient evidence. In Appellant's Opening brief, there was almost no discussion in support of the argument. The brief consisted mainly of extensive excerpts of the transcript relating to the following testimony: (a) Frank Castro's testimony that recording a map does not guarantee ownership of the property but is a step required in a land registration proceeding. (b) Frank Castro's testimony that there is no land registration decree stating that the claimed parcels of land were government of Guam land. (c) Frank Castro's testimony that the government of Guam does not know exactly how much land it owns. (d) Thomas Anderson's testimony that Gill himself never falsified any public records, and that the maps were not recorded as public instruments before Anderson manipulated them to encompass government land. (e) Joseph B. Cruz' testimony that he never met defendant Gill until the time of trial.

Because of the inadequacy of the initial briefing, the Court issued an Order that for each count of conviction, Appellant was to specify the grounds upon which the appeal is based. If the appeal was based on insufficiency of the evidence with respect to any count, Appellant's counsel was directed to discuss with specificity the deficiencies in the proof which requires reversal of each such count. If the appeal of any count of conviction was based on other grounds, those were to be stated with specificity, with full discussion and legal

authorities to support such ground. The Panel ordered, "each count should be stated and discussed separately."

*6 Accordingly, by this Court's Order of November 10, 1993, Defendant's pre-argument brief in this case was vacated and counsel for Appellant was directed to submit new briefing. .The government of Guam was permitted to file an Opposition to the Supplemental Brief.

Defendant filed his Supplemental Brief on November 29, 1993. The Territory of Guam filed their Opposition Brief on December 14, 1993. The November 10, 1993 Order stated that there would be no further oral argument. The case now stands submitted before the Appellate Panel on the Supplemental Briefs.

In his Supplemental Brief, the grounds for appeal appear to be: 1. Under Guam's "Theft of Property" statute, 9 G.C.A. § 43.30(b), one must be in a fiduciary relationship with the property owner in order to commit that offense. 2. "An attempt to commit an act which is not a crime cannot be the basis of a criminal conviction." 3. There is no evidence that Gill was empowered to dispose of land. 4. Gill did not falsify anything that was already a "record" and therefore cannot be guilty of falsifying public records. 5. There is no evidence that Gill falsified a record.

STANDARD OF REVIEW

When a criminal defendant asserts that there is insufficient evidence to sustain the conviction, this Court reviews the evidence in a light most favorable to the prosecution to ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. U.S. v. Necoechea, 986 F.2d 1273 (9th Cir.1993). The Ninth Circuit has noted that this is a highly deferential standard. U.S. v. Rubio- Villareal, 967 F.2d 294 (9th Cir. en banc 1992).

Appellant has also raised issues of statutory interpretation and impossibility. Issues of statutory construction are reviewed de novo. United States v. Martinez-Jiminez, 864 F.2d 664 (9th Cir.1989). Certain of the issues presented as "subsidiary issues" to his sufficiency of the evidence argument were presented in a motion to dismiss, Tr. I, II, IX p. 175, and as such receive de novo review. These are: the issue whether it was necessary for Gill to have been in a fiduciary capacity

to the property in question, whether he can be guilty of an Attempt if the underlying conduct could not have constituted a crime, and whether Gill acted in a fiduciary capacity with respect to the property.

The argument with respect to the Tampering with Public Records conviction, (that Appellant did not tamper with anything not already a record) does not appear in the record below. Therefore, this Court reviews under the plain error standard. United States v. Benny, 786 F.2d 1410 (9th Cir.1986), cert. den. 479 U.S. 1017 (1986).

DISCUSSION

I. Sufficiency of the Evidence

Gill was charged and convicted of (1) Conspiracy to Commit Theft, (2) Three counts of Attempted Theft (one for Piti, one for Umatac, one for Merizo) and (3) Conspiracy to Tamper with Public Records. [FN9] Appellant argues that there was insufficient evidence to sustain these convictions.

A. Conspiracy to Commit Theft of Immovable Property

*7 The elements of Conspiracy to Commit Theft of Immovable Property are, in § 13.30 and § 43.30(b) respectively, (1) a conspiracy (2) on the part of the defendant to transfer immovable property of another or any interest therein with intent to deprive him thereof. A conspiracy consists of an agreement with one or more persons that one of them will engage in conduct which constitutes a crime, with the intention of engaging in, promoting or assisting in the conduct which constitutes such crime, and that one perform an overt act in pursuance of the agreement. 9 G.C.A. § 13.30.

While drawing a map alone does not constitute the crime of theft, fabrication of such maps and the taking of significant steps to legitimize such fabrication, coupled with intent to take government land, constitute the crime Conspiracy to Commit Theft. There was evidence that he meant to hold out to the public that he owned these lands by recording the maps. (Tr. VII p. 125). He was aware of Anderson's "good contacts" at Land Management. (Tr. VII p. 70). He was aware and in one instance was surprised at how well Anderson's contacts performed. ("No shit, maps approved?" followed by laughter; Tr. VII p. 126). He took title to land whose title Anderson had told him was "no good" as the title had been manufactured by Anderson and his

"contacts." (Tr. VII & VIII passim). There is evidence that Gill intended to sell the Umatac and Merizo land that he was purchasing from Anderson to Japanese investors. (Tr. VII p. 33). There was a great deal of evidence that Gill exercised ownership rights over land he knew was not his, i.e.; subdividing the land. Exhibits 4A, 5A, 6A, 7A and 8. There was evidence of a conspiracy between he and Anderson to steal government land. (Tr. VII pp. 119, 126; Tr. VIII pp. 84- 85).

Intent can be inferred, and government's counsel is correct that otherwise innocent acts, when viewed in context, can justify a jury's determination of guilt. U.S. v. Calabrese, 825 F.2d 1342, 1348 (9th Cir.1987). Evidence in this case revealed that Anderson and Gill agreed to include government land in their maps, and that they did so with the intention of registering the land and selling it. The evidence of recordation of the maps, as required by Guam's land registration laws, satisfies the overt element requirement of conspiracy. Accordingly, there was sufficient evidence to sustain that conviction.

B. Attempted Theft of Immovable Property

The elements of Attempted Theft of Immovable Property, found in § 13.10 and § 43.30 respectively, are (1) an attempt (2) on the part of the defendant to transfer immovable property of another or any interest therein with intent to deprive him thereof. An Attempt under Guam law is defined as when, with intent to engage in conduct which would constitute a crime were the circumstances as he believes them to be, one performs an act which constitutes a substantial step toward commission of the crime. Although the record is clear that the transfer never occurred, that is, that the Land Registration proceeding was never completed, there was sufficient evidence of the attempt. Among the many acts which would constitute a substantial step toward the completion of theft of immovable property, one of the most obvious was the recordation of maps as required by the Land Registration Act, § 1157.4, § 157.5. With respect to the Piti lot, the evidence shows that a map was recorded as document number 414584 showing Gill's lot to be 3 hectares (instead of 1.3 hectares). With respect to the Umatac lot, a map of Lot 154A showing the size of the lot to be 10 hectares (instead of 3 hectares) was recorded at Land Management as document number 417952. Gill's map showing Lot 503NEW Merizo to consist of 182.05 hectares (instead of 32 and 33 hectares) was recorded at Land

Management as document number 424063. Each recordation constituted a substantial step toward each crime which, if completed by a Land Registration proceeding, would have constituted the crime of theft of immovable property.

C. Government Ownership of the Land as an Element of the Crime of Theft of the Immovable Property of Another.

*8 One of the grounds for reversal argued by Appellant's counsel is that the government did not prove that the land obtained through the false maps was indeed government land. The Panel notes that the conviction is for theft of the immovable land "of another," and therefore, the government would have to prove that defendant Gill did not own the land in order to prove the elements of § 43.30(b). [FN10]

Appellant's argument fails for the primary reason that the government indeed presented evidence that the land in question was government land. The government elicited testimony from Frank Castro, Director of Land Management, that the land in question was government land. (Tr. III pp. 18-20). The Director of Land Management based his conclusion on the fact that the land in question in this case was transferred to the government of Guam by the United States. (Tr. III pp. 16-17) The government also presented testimony of Department of Land Management worker Jimmy Camacho that the land being claimed was government land. (Tr. IV p. 114). While the evidence that it was government land was not supported by the document creating title in the government of Guam, there was nonetheless adequate and compelling evidence that it certainly did not belong to appellant and that the land was government land. And, this evidence was never contradicted.

As to defendant's contention that Castro later testified that the government of Guam was uncertain as to how much land they own, the issue of whether the land belonged to the government was a fact issue. As such, it was up to the trier of fact to decide whether the government proved that it was government land. Because Castro testified that the land was government land, there is a factual basis for the jury's determination that is was government land. We decline to disturb the finding of the jury.

Further, it is clear from the record that Appellant knew that the land he sought was government land, because he knew the size of his own land before the Anderson maps were begun. (Tr. VII pp. 112-13; Tr. VIII pp. 26-32; pp. 82- 83). The record is replete with evidence that the purpose of the scheme was to obtain land which he did not own.

This conclusion is supported by Guam law. The Panel takes judicial notice of Title 21 Guam Code Annotated § 1202, where it is provided that all land not owned by another owner belongs to the government of Guam: Government Property. The government of Guam is the owner of all land below tidewater, and below ordinary high-water mark, bordering on tidewater within Guam; of all land below the water of a navigable lake or stream; of all property lawfully appropriated to its own use; of all property dedicated to the government; and of all property of which there is no other owner.

D. Conspiracy to Tamper with a Writing or Record

A conviction for Conspiracy to Tamper with Public Records requires that the prosecution prove (1) a conspiracy (2) on the part of the defendant to falsify, destroy, remove or conceal, (3) knowing that he has no privilege to do so, (4) any writing or record, (5) with intent to deceive or injure anyone or to conceal any wrongdoing. The evidence established that there was an agreement between Anderson and Gill to falsify maps. Once falsified, the maps were recorded at Land Management, thus becoming public records. Anderson and Gill knew that the land being claimed by them in the maps was public land and that they had no right to claim the land as their private land in a later land registration proceeding. There was sufficient evidence to sustain the conviction for Conspiracy to Tamper with Records.

II. Issues of Statutory Interpretation

A. Statutory Interpretation of § 43.30

*9 The first issue raised in Appellant's Supplemental Brief is whether one can be found guilty of theft of immovable property of another without having first been in a fiduciary capacity to that property. This argument does not compel reversal. Neither 9 G.C.A. § 43.30(b) nor the Model Penal Code section from which § 43.30 was derived contain the limitation proposed by counsel. The comments to MPC § 223.2 [FN11] confirm that that section is designed to impose

criminal liability regardless of the relationship between the accused and the land, though certain exceptions are noted in that comment which do not apply in this case. There is simply no requirement in the law that the person charged with the crime must stand in a fiduciary relationship to the property.

Since empowerment to dispose of the land is not an element of the crime, lack of such evidence is not relevant.

B. An Attempt to Commit an Act which is not a Crime

The second argument posited by Appellant is that one cannot be found guilty of attempt if the completed conduct would not constitute a crime. In the Supplemental Brief, Appellant offers only excerpts from the case of Commonwealth v. Henley, 474 A.2d 1115 (Pa.1985), the same legal authority argued to the trial court, stating that if it is legally impossible to commit the crime, there cannot be criminal culpability. The Henley case cites the example where the fisherman believes that he is fishing illegally because he has no license, while in fact, no license is required on the lake on which the fisherman is fishing.

The Panel rejects this argument because the act, if completed, would have been a crime, as is the attempt. The Guam Legislature defined Theft of Immovable Property to be a crime when it adopted this section of the Model Penal Code in 1978.

C. Whether there is a requirement that the writing tampered with must have been a "record."

The next issue is whether Gill falsified a "record" because the maps were not yet public records when they were created. This argument was alluded to in the original brief, in Anderson's quoted testimony that Gill himself never touched the maps, and that the maps were not public records when they were being produced.

We again find Appellee's argument persuasive that the language of the statute imposes criminal culpability for falsifying a "writing or record." 9 G.C.A. ss 46.25 [emphasis added]. Despite the title of the statute, there is no requirement in the statute that the writing be a matter of public record before the falsifying is accomplished. The falsification is in the making of the maps.

Therefore, Appellant's contention that "there is no evidence that Gill conspired to falsify anything that was already a record," is

irrelevant to the analysis because the statute does not require that the falsified document only be a record or first be recorded. There was a statutory basis for the conviction, and sufficient evidence to support it.

*10 The convictions are AFFIRMED.

UNPINGCO, Judge, concurring.

To the extent that the argument presented also supports the contention that it was impossible to complete the crime, whether legally or factually, I further note that impossibility, whether legal or factual [FN12], is not available as a defense to Attempt under Guam law. The Guam Criminal and Correctional Code, 9 G.C.A. § 13.15, provides: Same [Attempt]: Impossibility No Defense. In a prosecution for an attempt, it is no defense that it was impossible to commit the crime. This code section was derived from Model Penal Code § 5.01, which focuses on the accused's state of mind as he believed the circumstances to be. **United States v. Allen,** 27 M.J. 234 (C.M.A.1988). Therefore, I therefore reject any corollary argument that there it was impossible to complete the crime, as Guam law, like the M.P.C., is designed to impose culpability for criminal intent.

FN1. The Honorable Edward Rafeedie, United States District Judge for the Central District of California, sitting by designation.

FN2. The Honorable Alex R. Munson, United States District Judge for the District of the Northern Mariana Islands, sitting by designation.

FN3. A hectare is equal to 2.471 acres.

FN4. The Reporter's Transcript will be designated herein by the notation "Tr." followed by the volume of Reporter's Transcript in which the reference is contained, followed by the page number.

FN5. A "checkprint" is a paper copy of the original Mylar draft map that is submitted to Land Management before the Mylar map is submitted. Surveyors submit this so that Land Management can mark the corrections that need to be made and the surveyor can modify the

map to Land Management's specifications before the original is submitted. (Tr. III Part Two p. 111).

FN6. There was testimony that Anderson and Joe Cruz had frequent contact as cousins, and that Anderson had lent him up to $15,000.00 to pay his debts, and that Cruz paid him back only a couple of hundred dollars of that sum. (Tr. VII p. 138).

FN7. An escaped assessment is provided for in the Guam Government Code § 19319: Property not previously assessed. If any property has escaped assessment in one or more prior years and is owned or claimed by the same person who claimed it or owned it during such prior year or years, the assessor shall assess the property at its value on the first Monday in March of every such year. Property which has previously escaped assessment shall be treated as property regularly assessed on the roll on which it is entered, but the entry of the assessment shall be followed with "escaped assessment for year _____."

FN8. The Panel takes judicial notice of the fact that Land Registration is not the only method by which one acquires secure title to real property on Guam. Guam's Land Registration law was borrowed from the California Civil Code in 1953. California has since eliminated its land registration law, and title in that state is normally secured by title insurance, as in any other state without the land registration system. In Guam, the two systems exist side by side, with some parcels registered while much real estate remains un-registered, its owners protected by the security of title insurance. Nonetheless, one can assert title with a valid deed in the chain of title. If the dimensions of the lot as shown in the deed are reflected in a map, this strengthens one's claim to title to the lot. Therefore, a completed land registration proceeding is not a prerequisite to asserting ownership in a quiet title action. However, once adjudicated in a land registration proceeding, one's registered title can only be set aside upon a showing of fraud.

FN9. The statutes under which Gill was charged were: 9 G.C.A. § 13.30 "Conspiracy: Definition"; 9 G.C.A. § 13.35, "Same:

Multiple Criminal Objectives"; 9 G.C.A. § 13.40, "Same: Scope"; 9 G.C.A. § 13.60, "Attempt, Solicitation, Conspiracy: Degree of Offense Stated"; 9 G.C.A. § 43.20(a), "Theft; Defined and Punishment Classified"; 9 G.C.A. § 43.30(b), "Theft of Property; Defined"; and 9 G.C.A. § 46.25, "Tampering with Public Records to Deceive or Conceal; Defined and Punished."

FN10. § 43.30. Theft of Property Defined.

* * *

(b) A person is guilty of theft if he unlawfully transfers immovable property of another or any interest therein with intent to deprive him thereof.

FN11. The Commentary notes, The inclusion of real estate within the definition of "property" also has the effect of extending the theft provisions to situations where the actor secures title or other interest in real property by deception or threat.

* * *

[I]t seems clear that criminal liability for theft is appropriate in cases where a person seeks to benefit himself or another through the illegitimate transfer of interests in real property. There is little to distinguish such cases from any other attempt to secure economic benefit at the expense of another. American Law Institute Model Penal Code Commentary, p. 167-173.

FN12. Eg.; a defendant is convicted of rape of a person who the defendant did not know was dead at the time of the rape, thus creating a factual impossibility, as in United States v. Thomas, 32 C.M.R. 278, 1962 WL 4490 (C.M.A.)). This is distinct from the situation described in Henley where there was no legal requirement for a fishing license, thus creating a legal impossibility for the crime to be completed. Both are examples of impossibility, because the completed conduct would have been criminal if the legal or factual impossibility had not existed.

CERTIFICATE OF SERVICE

I, Charles H. Troutman III, a member of the Bar of the Supreme Court of the United States and counsel of record for the Territory of Guam, Respondent herein, hereby certify that on March 28, 1996, pursuant to Rule 29, Rules of the Supreme Court, I served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on the other party herein, as follows:

On Francis L. Gill, Petitioner herein, by depositing such copies in the United States Post Office or mail box, Agana, Guam, with first class postage prepaid, properly addressed to the post office address of Jerry E. Hogan. The above-named Petitioner's counsel of record, at HOGAN & LINK, P.C., 104 Reflection Center, 222 Chalan Santo Papa, Agana, Guam 96910.

All parties required to be served have been served.

Dated: March 28, 1996.

Charles H. Troutman

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Supreme Court, U.S.
FILED
APR 12 1996
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NO. 95-1375

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

FRANCIS L. GILL,

PETITIONER,

- vs -

TERRITORY OF GUAM,

RESPONDENT.

On Petition For Writ of
Certiorari To The United States
Court of Appeals For The Ninth Circuit

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner.

18 pp

QUESTION PRESENTED

Petitioner states that private and public lands were defined and distinguished in the Treaty of Paris of 1898. The disputed parcels were implicitly defined in the Treaty as subject to private uses and claims. There is no evidence in the record that these lands were later acquired by the United States of America or statutorily conveyed by the United States to the Government of Guam. The record is further devoid of any United States statute amending the Treaty and authorizing the Government of Guam to acquire or claim ownership of the property. The Government of Guam therefore has no legal authority to claim

the lands as its own or to extinnguish Petitioner's rights of adverse posseession or possession by occupancy, or prescription.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

FRANCIS L. GILL,

PETITIONER,

- vs -

TERRITORY OF GUAM,

RESPONDENT.

On Petition For Writ of
Certiorari To The United States
Court of Appeals For The Ninth Circuit

BRIEF IN REPLY TO OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Francis L. Gill ("Petitioner") hereby responds to the Respondent's Brief in Opposition to Petition for Writ of Certiorari.

Petitioner states that:

(a) The question presented to this

Court has been implicitly ruled upon below;

(b) That Petitioner has identified an important federal question and merits certiorari;

(c) Petitioner relies on accurate facts in the presentation of its Petition; and

(d) Petitioner's analysis is correct and the charges against him should not have been brought.

STATEMENT OF THE CASE

The distinction between public and private lands as defined in the Treaty of Peace of 1898 was implicitly passed upon by Judge Weeks in the Superior Court below.

This implicit presentation and review continued in the District Court of Guam Appellate Division and in the Ninth Circuit Court of Appeals.

ARGUMENT

1. The question presented was implicitly reviewed below.

Petitioner's position that the Treaty of Paris of 1898 ("Treaty") prevents the Territory of Guam from bringing the charges was implicitly ruled upon in the courts below.

Judge Weeks, the Superior Court judge, implicitly relied upon the Government of Guam's sovereign authority to establish its uncontestable interest in the disputed property. The judge wrote:

> Therefore the Government need not have had absolute title to the land, as long as it had an interest in it. That the Government may have some title, although not absolute, to the land in question, despite its

> lack of Certificate of Title, is clear. This can be demonstrated through an examination of Guam's adverse possession statutes. The adverse possession statutes, as they relate to the same subject matter, must be construed together. (Citation omitted). One statute provides that one cannot gain title through adverse possession to land which has already been registered. 21 G.C.A. Section 29136. <u>However, Government claims present a special case.</u>

Petitioner's Appendix "D", Judge Weeks Decision and Order of May 12, 1992 at p.4. (Emphasis Added).

This implicit reliance on the sovereign authority of the Government of

Guam to establish an uncontestable interest in the land was reinforced and expanded by the District Court of Guam Appellate Division ("Appellate Division") and the Ninth Circuit Court of Appeals ("Ninth Circuit"). The Appellate Division took judicial notice of 21 Guam Code Ann. Sec. 1202 placing ownership of all land without an owner of record with the Government of Guam (Respondent's Brief Appendix A at p.A-13). The Ninth Circuit also relied on this section. People of the Territory of Guam v. Gill, 61 F.3d 688, 693 (9th Cir. 1995).

The courts below implicitly concluded that the Government of Guam's sovereign authority to claim ownership to the land at issue was uncontestible and Petitioner had no right to make adverse claims against that interest. The Government of Guam was not required to

show that its claimed ownership interests were derived from land defined as public in the Treaty or obtained pursuant to any United States law amending the Treaty. An issue which must necessarily have been passed on is properly raised. Illinois v. Gates, 462 U.S. 213, 222 (1983).

Moreover, the issues relating to ownership of the disputed property were central to the litigation, and therefore, the record below relating to ownership issues has been fully developed.

2. Petitioner has presented an important Federal Question for review by this Court.

The important Federal Question presented is the supremacy of the United States of America's Treaty commitments over the Government of Guam's "authority to control land within its boundaries".

(See, Respondent's Motion for Extension of Time in Which to File Brief in Opposition at p.3).

Additionally, the interpretation of the extent of the United States Treaty commitments not to impair private property rights in Guam is an important federal question. Important federal questions that should be, but have not been settled by this court, may be properly reviewed. Rules of the Supreme Court of the United States Rule 10(c).

The question presented "may have significant implications for the island of Guam". (See, Respondent's Motion for Extention of Time in Which to File Brief in Opposition). The implications of this Petition may also extend to the island of Puerto Rico. (Treaty of Peace, Article II).

3. Petitioner accurately stated the facts on which his Petition relies.

a. The record is accurately stated.

Neither the Organic Act of Guam, on which Respondent relies, nor any other United States statute transferred ownership of the disputed property to the Government of Guam. 48 U.S.C. 1421f. The record is also devoid of any statutory basis for any governmental action to convert the disputed real property to public ownership.

A treaty can only be modified by a subsequent treaty or statute. Ribas v. U.S., Puerto Rico, 24 S.Ct. 727, 194 U.S. 315, 48 L.Ed. 994.

b. Petitioner accurately states Guam law.

Under Guam law, any ownership interest or claim may be brought under the Land Registration Title Act. 21 Guam

Code Ann. Sec. 29105. However, a land owner in Guam cannot claim registered title until a registration has been completed and a certificate of title issued. 21 Guam Code Ann. Sec. 29132.

4. Petitioner's legal analysis is well founded.

The Government of Guam begins and ends its legal analysis of the ownership of the disputed property by concluding "no private person has been permitted to claim land for which there is no previous owner." (Respondent's Brief in Opposition at p.5). Respondent concludes it therefore must own the disputed lands.

This reasoning is faulty and ignores the effects of the Treaty on land ownership rights in Guam. It also ignores the effect of the Treaty on the Government of Guam's authority to claim ownership of land recognized as subject

to private uses and rights by the United States.

Ultimately, the Government of Guam's legal analysis, despite claims to the contrary, extinguishes all private rights to use the disputed property or to acquire title to them through adverse possession, prescription or occupancy.

Thus, a correct ownership analysis must begin with the Treaty and follow a chain of title to its current ownership.

5. The private character of the real property at issue is relevant to the validity of Petitioner's convictions.

Real property which can be possessed adversely or by prescription or occupancy cannot be stolen by an adverse claim of ownership. If the real property at issue is subject to the private property protections of the Treaty, then, Petitioner cannot be punished for

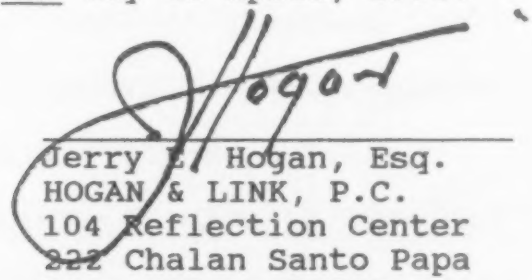
exercising these rights.

Thus, if the Government of Guam unlawfully acquired the disputed property, it could not, by this unlawful acquisition, extinguish Petitioner's right to use the property or adversely possess them.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Dated this 11 day of April, 1996.



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CERTIFICATE OF SERVICE

I, JERRY E. HOGAN, a member of the Bar of the Supreme Court of the United States and counsel of record for Francis L. Gill, the Petitioner herein, hereby certify that on April 12, 1996, pursuant to Rule 29, Rules of the Supreme Court, I caused three (3) copies of the foregoing Brief in Reply to Opposition to Petition for Writ of Certiorari to be served on Andrew Artero-Boname, Assistant Attorney General, Respondent's counsel of record, by hand delivering said copies to Suite 2-200E, Guam Judicial Center, 120 West O'Brien Drive, Agana, Guam 96910.

All parties required to be served have been served.

Dated this 12 day of April, 1996.

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